

No. 11397

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. A. GERETY, WILLIAM HARRAH, CHARLES
BROWN and HAROLD POOL,

Appellants,

vs.

ABBOT KINNEY COMPANY,

Appellee.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 305 to 615, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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(Testimony of John Harrah)

Q. What did you say, if anything, when Mr. Darling made a request for payment on account of the contract?

A. Oh, I don't remember what anybody said specifically; but I remember the general attitude was that the company wanted to pay them as fast as they could but they didn't have [125] any money to pay them with. The company was not profitable, the operation.

Q. As a matter of fact, the company was in default of its bonds and had been in default of its bonds since 1932, had it not? A. And still is.

Q. It hasn't paid anything on its bonds since 1932?

A. 1932 is correct.

Q. And it was also deeply indebted on account of taxes on the property?

A. Well, at some times in the past—there have been times when the tax situation was bad. But it has been pretty well cleared up now.

Q. When you say it has been pretty well cleared up, you merely mean as to its properties which you consider as of value to the company?

A. Well, yes, there are some properties down there that were not ever profitable; that is, for many years, that the taxes have grown greater than the value of the property, in my opinion.

Q. Now as a result of this outstanding indebtedness, didn't you often state that in your opinion the Cruickshank Company contract had no value?

A. No, I don't think I ever stated it had no value.

Q. Just what did you state about that, then?

A. Oh, I don't know. I talked about the Cruickshank [126] contract many times with different people. I don't remember what I stated at different times about it; that

(Testimony of John Harrah)

is, at most of the times. I remember what I stated to Charley Brown when he asked me about it, as far as—

Q. What have you told in Directors' meetings regarding its value?

Mr. Cobb: I object on the ground that it is hearsay and inadmissible as far as Mr. Brown is concerned.

Mr. Davis: Mr. Brown is a party.

Mr. Cobb: Mr. John Harrah has quitclaimed any claims he has, and it would not be admissible against Mr. Brown or Mr. Gerety that this man might have declared or had an opinion at one time as to the validity or invalidity of the contract. And if the other parties were not there, it would be hearsay.

Mr. Davis: If your Honor please, Mr. John Harrah is a party to this. The fact that he disclaims an interest does not mean that he has been relieved of any—

The Referee: I don't think so, Mr. Cobb. The evidence shows that Mr. Brown sold half of his interest in this contract to Mr. Harrah's son for \$3,000, and a part at least of the negotiations for that transfer was handled by Mr. John Harrah. No, the objection is overruled. But try to make your questions as specific as you can, Mr. Davis.

Mr. Cobb: May I say this, your Honor: I will not object to anything that occurred after that date; but I do object to going back since 1937, before there was any such relationship. [127] Counsel charges conspiracy. I think he ought to state when the conspiracy was entered into so that we could have some date that we could tie our objections to, not go back to—

The Referee: It is not merely a question of conspiracy. If it be shown that any one in a fiduciary relation-

(Testimony of John Harrah)

ship to this corporation purchased a claim against the corporation, then that person may be allowed only what he paid for that claim.

Mr. Cobb: I am not arguing that question; but he is calling for something that occurred in a Directors' meeting when Mr. Davis and Mr. Harrah were talking about this contract, when none of the respondents was present.

The Referee: That doesn't make a bit of difference. It is all a part of the general question. If it be shown that the witness John Harrah took one attitude toward this contract while it was in the hands of the Cruickshank Company and took another attitude when it was in the hands of Charles Brown, who concedes that he held it in trust partially for the general manager of the company, that may be a very important circumstance. The objection is overruled. Go ahead, Mr. Davis. Make your questions as specific as you can.

Mr. Davis: Q. Is it not a fact, Mr. Harrah, that every time the Cruickshank Company contract was discussed in the meetings of the Board of Directors of the Abbot Kinney Company you always stated that in your opinion the Cruickshank Company contract was not worth fussing with or having anything [128] to do with?

Mr. Cobb: We object to that on the ground that the question is leading and suggestive and that no proper foundation has been laid.

Mr. Davis: After all, Mr. Harrah is an adverse—

The Referee: You have not called him as an adverse witness.

Mr. Davis: I think that we have, your Honor.

The Referee: No, you have not. You called him as your own witness.

(Testimony of John Harrah)

Mr. Davis: I did not intend—

The Referee: I don't care what you intended. I am talking about the record here.

Mr. Grainger: I understand that in the Bankruptcy Act there is no provision in there saying—

The Referee: We operate under the rules of federal procedure.

Mr. Grainger: 21-J—

The Referee: You may, but he has not done it. He has not said anything about 21-J or an adverse witness.

Mr. Grainger: I don't think you have to make the request.

Mr. Davis: That being the case, I would like to call Mr. Harrah as an adverse witness. At this time I relieve him from my call and would like to call him as an adverse witness, as a party to the litigation.

The Referee: Let us find out what the procedure is.
[129]

Mr. Cobb: We object to that on the ground, since the witness has disclaimed, he is not a proper party to call as an adverse witness. That ruling has been extended where you are limited only with respect to officers of a company as well as agents of the particular parties named in the statutes, because it is contrary or an exception to common law and it is purely statutory.

Mr. Grainger: My understanding of the purpose of that 21-J is to extend it to those who are—

The Referee: (Reading:

"In any proceeding or controversy, or in any plenary suit, brought under this Act, if it shall appear that the interest of a witness is adverse to the party calling him,

(Testimony of John Harrah)

such witness may be examined as if under cross-examination and the party calling him shall not be bound by such testimony.”)

Mr. Davis: That is correct, your Honor.

The Referee: But “if it shall appear that the interest of a witness is adverse to the party calling him, such witness may be examined as if under cross-examination and the party calling him shall not be bound by such testimony.”

Mr. Cobb: There wasn’t any evidence here at all—

Mr. Davis: It certainly appears that it is adverse. The mere fact that he has stated that he does not have any interest will not be followed through by the evidence. In other [130] words, he is representing—

The Referee: Before you can examine him as an adverse witness, that has to appear.

Mr. Davis: Your Honor, I think it is appearing.

The Referee: In what way?

Mr. Davis: We intend to show by Mr. Harrah that he in fact, through William Harrah, is participating in this. I think the evidence up to this point has shown that William Harrah is participating in it. I think all of the inference that will necessarily be drawn from the evidence is that Mr. William Harrah had his interest in the first instance; that John Harrah, in control of the Executive Committee, voted to give William Harrah, Edward Gerety, and Mr. Brown this contract for the purpose of defrauding the company.

Mr. Cobb: Let us lay some foundations for these statements.

The Referee: Can you prove your allegations in your petition, that Mr. John Harrah voted against the propo-

(Testimony of John Harrah)

sition to pay the Cruickshank Company \$10,000 in full settlement of their contract?

Mr. Davis: Yes, by Mr. Harrah's own admission.

The Referee: Can you prove that Mr. John Harrah voted to pay Mr. Brown \$7500 and \$30,000 on that contract?

Mr. Davis: By his own admissions.

The Referee: If you can prove those things, you may be in a better position here. [131]

Mr. Davis: I was just getting up to that.

The Referee: Well, prove that first, because under this Section you have got to show his interest is adverse before you can cross examine him as an adverse witness. All right, go ahead.

Mr. Davis: Q. You were a member of the Executive Committee that met on the 20th day of June, 1944?

A. I presume so. I was a member of the Executive Committee at that time.

Q. And you voted at that time to pay Mr. Charles Brown the sum of \$7500 on account of the Cruickshank contract? A. Yes, I did.

Q. And you knew at that time that Charles Brown had only paid \$15,000 for the contract?

A. I think he told me that's what he paid for it.

Q. And you voted on November 7, 1944, after the petition in bankruptcy had been filed, to pay Mr. Brown \$30,000 on account of the Cruickshank contract?

A. I did.

Q. You voted for the payment of the \$30,000 at that time? A. I did.

(Testimony of John Harrah)

Mr. Davis: I can introduce these minutes in evidence, your Honor; but I don't think they are necessary.

The Referee: What about the Cruickshank offer? You have not proved anything on that.

Mr. Davis: Q. In January of 1943 did Mr. Al. Newton [132] present to the Executive Committee at a meeting at which you and he were present an offer of the Cruickshank Company to settle the obligation of the Abbot Kinney Company to the Cruickshank Company in the sum of \$137,000 for \$10,000?

Mr. Cobb: We object on the ground that it is too remote. January, 1943, has no bearing on the issues of this case and is hearsay as far as Mr. Brown is concerned.

The Referee: Overruled.

The Witness: I will tell you what he did do.

Mr. Davis: Q. I will call your attention to the minutes of the regular meeting of the Executive Committee on January 14, 1943, and ask you if this is your signature? A. Yes, that is my signature.

Q. And you signed those minutes? A. Yes.

Q. I would like to read the minutes to you and ask you if these are minutes of the actual matters that took place at that time:

"The offer of H. S. West to cancel the sprinkler contract for the sum of \$10,000 was proposed by Al. Newton who voted for the acceptance of the proposition. John Harrah voted no on the proposition."

Is that actually what took place at that time?

A. Not strictly.

Q. Just what did take place at that time? [133]

A. Well, it was one of our regular meetings; and Al. Newton was present and I was present. Carleton Kinney

(Testimony of John Harrah)

was absent. I see I signed the minutes, but I was not there. So Al. said—I don't know whether he said Phil or Tom, meaning you or your brother, one or the other—had been talking to Hugh Darling and Red West, and that he had obtained from them an option to buy that contract for \$10,000, and that you had had the option—as I remember now, he said—either ten days or two weeks. And he said the option had expired that day, I believe he said. The meetings were held in the afternoon. But he said that you had obtained an oral option for the rest of the day and he thought the company ought to buy it.

I said, "Well, it would be all right; but what is the company going to buy it with?"

We asked how much money they had on hand. The bookkeeper reported about \$2,000. Al. said, "We can raise the money somewhere."

I says, "Where can we raise it?" I says, "Will you put up your part of it?"

He says, no, he couldn't put up any money right at that time.

I said, "What are you going to buy it with, then? What terms do they want?"

He said, "All cash."

While we were talking, the phone rang; and Mr. Lou Halper [134] was on the phone, who was a director of the company. And Mr. Gerety, who was there, called me and I answered the phone. And Lou Halper said that—mentioned one of the Davis's, which I don't remember now, yourself or your brother—phone and said the Cruickshank Company contract could be bought for \$10,000. He said, "There is no money to ever pay on that contract," is what Lou Halper said. And he said, "I am not in

(Testimony of John Harrah)

favor of it being done" and said, "I talked to Frank Williams a number of times about it, and I know that's his sentiment."

"Well," I said, "if it can be bought for \$10,000, who is going to put up the money? The company only has \$10,000."

Lou says, "Nobody."

So that was practically it. And Al. said well, he wanted to make a motion, wanted to reverse himself as being in favor of it.

I says, "All right, then, you vote yes on it and I will vote no."

The Referee: You may cross examine the witness.

Mr. Davis: Thank you, your Honor.

Q. Is it not a fact, Mr. Harrah, that at all of the meetings of the Board of Directors of the Abbot Kinney Company, whenever this question of the payment of the obligation to the Cruickshank Company was considered, you always stated that the contract was subordinate to the bonded indebtedness and to the taxes, and that in your opinion it had no value upon [135] which the company should pay any money.

Mr. Cobb: We object to that on the ground that it is a compound question; that it covers a period beyond any of the issues involved here; that it is leading and suggestive; and that it does not tend to prove or disprove any of the issues in this case.

The Referee: All objections are overruled except the objection that it is a compound question. That is sustained. Mr. Davis, make your questions as simple as you can, one point at a time.

(Testimony of John Harrah)

Mr. Davis: Q. Is it not a fact, Mr. Harrah, that you stated at the Board of Directors' meetings of the Abbot Kinney Company that you did not believe the Cruickshank Company contract had any value so far as payment by the Abbot Kinney Company was concerned?

Mr. Cobb: We object on the ground that it is compound. They have had meetings since 1937 every week, and how are we going to call in a witness to testify on what occurred at a particular meeting and what was said and done at each particular meeting? The court can draw its own conclusions in a summary of the—

Mr. Kitzmiller: We make the further objection that no foundation has been laid for the particular question.

Mr. Davis: This was a statement made at every single meeting we had, at every—

The Witness: No, that is not true. [136]

Q. What did you say regarding the value of the Cruickshank Company contract so far as payment of money by the Abbot Kinney Company on its account—

Mr. Cobb: We object on the ground that the proper foundation has not been laid and, further, on the ground that the question tries to limit it to a particular phase of the subject sought to be inquired about and does not permit the witness to give the whole conversation. I submit that we are entitled to have a foundation laid as to who was present and what was said by what parties.

Mr. Kitzmiller: Especially the time.

The Referee: The objection is sustained. However, the questions now are limited to things which were said at formal meetings of the Executive Committee of the corporation; therefore no foundation need be laid as to who was present.

(Testimony of John Harrah)

Mr. Davis: If your Honor please, these are the Directors' meetings.

The Referee: Oh, Directors' meetings?

Mr. Davis: Yes. I was never present at—

The Referee: All right, Directors' meetings. There need be no foundation as to who was present. Counsel may inquire from this witness first as to whether he held a consistent attitude with respect to those payments, those payments by the Abbot Kinney Company on the Cruickshank contract. If his answer is that he held a consistent attitude, then counsel may inquire as to what that attitude was as formally expressed [137] by the witness at the Directors' meetings. Proceed.

Mr. Davis: Q. Did you, Mr. Harrah, express a consistent position as to the payment on account of the F. R. Cruickshank Company in the meetings of the Board of Directors?

Mr. Cobb: We object on the ground that it is ambiguous as to "consistent," and that—

The Referee: "Consistent" means did he continuously advocate the same course of treatment or the same position, or did he at some time or other change his position. The objection is overruled.

The Witness: Yes, I maintained a consistent position.

Mr. Davis: Q. Now what was that position which you maintained.

Mr. Cobb: We object on the ground that it calls for the conclusion of the witness and that no proper foundation has been laid.

The Referee: Well, we will interpret the question to mean the substance of what he said. The objection is overruled.

(Testimony of John Harrah)

Mr. Cobb: And when, your Honor? I mean, that is important.

The Referee: The time is whenever the matter came up for discussion at the Directors' meetings at which Mr. John Harrah was present.

Mr. Cobb: I object to any time before there is any charge that Mr. Brown had anything to do with this contract. [138]

The Referee: The objection is overruled. Proceed.

The Witness: Well, there was—that sprinkler contract was not mentioned in many Directors' meetings. In fact, your records will show that there weren't many Directors' meetings. There were very few over the period of the last four years, I would say.

Mr. Davis: Q. Between 1937 and 1941—we will limit our time to those years to start with now—

A. I don't know how many Directors' meetings there were. There weren't many then.

Mr. Cobb: I want to interpose an objection to that period of time. It is too remote. It has no bearing on the issues of this case, what he might have thought in 1941 or 1944, when they charge that this was acquired under a conspiracy. It is too remote to have any bearing on the issues here.

The Referee: Overruled. Go on.

The Witness: 1937 to 1941?

Mr. Davis: Q. Yes.

A. During that time it was brought up oftener than it was afterwards. In fact it was brought up occasionally by Hugh Darling, because I think he was on the Board of Directors all that time. And what I said at the time

(Testimony of John Harrah)

was when the company had any available money, they would pay money to them. Hugh Darling mentioned at the time—right at that time when I went on the Board of Directors, when that bond and stock [139] contract was signed, that another agreement was prepared and which he wanted executed—my recollection is—I have no distinct recollection of it being executed—wherein all the parties to that agreement agreed to, as far as we possibly could, make the payments on that proposed supplemental sprinkler contract in the amounts and at the times they were to be made. He mentioned that, and they all agreed, orally at least, that they would do that. The discussion during that period of time always was to the effect that the money was needed to pay the taxes and not let the taxes on the operative property get any farther back, any farther than possible, so as to avoid those penalties, which accrue very rapidly. And the discussion when Hugh Darling was not present—and those discussions usually were of a broader nature—they would consider then the value of the real property as an amusement pier and also the prospects of selling a right of way through there, which had been worked on for many years, for a large sum of money. And that was more—they figured out the ultimate value of these things, my statement at that time being, I think, practically the statement of most all the directors, that upon the sale of this for amusement purposes that the property wouldn't even pay off the bonded indebtedness or there wouldn't be anything left to pay a sprinkler contract or to go to the stock of the corporation.

Q. As a matter of fact, you made that statement many [140] times, Mr. Harrah, that it had no value

(Testimony of John Harrah)

so far as the assets behind the Cruickshank Company contract—

A. Why, I may have made that—I don't know how many times; but when it has come up for discussion, it was my opinion, and I think the general opinion of the Directors, except for being bailed out by some sale like that which had been worked on a long time, that property wouldn't even pay off the bonds and the interest. So that ultimately the Cruickshank contract—or the stock, neither one, if there was a forced sale or foreclosure under the bond issue that there would be nothing left for it.

But it was considered it had a value in that it would still—the owner would still have it and whoever acquired the property afterwards—there was a discussion about it. Some people weren't quite certain about it—that whoever owned the property afterwards would lose the sprinkling system. It could be removed or he would have to make some deal with the owner. There wouldn't be any charge against anybody, of course. So there was a lot of discussion about it, the value depending on the way things would work out and what the income of the company would be, whether there would be any money to pay them or there wouldn't be any money to pay them, and also as to whether Hugh Darling and Red West would be insisting on payments.

Q. As a matter of fact, Mr. Darling several times stated that he was going to pull out the sprinkling system and you [141] and the other directors told him that it was their opinion that, including myself—

A. You were not a director.

Q. But I was there at the Directors' meetings, if you recall, most of them at that time—that the contract, we

(Testimony of John Harrah)

felt, was subordinate to the bonds and that he couldn't take out the sprinkling system.

A. I never told him that. I never had that idea or that belief whatever.

Q. Wasn't that stated several times to Mr. Darling?

A. I don't think so. I have no recollection of anybody ever making that statement in a Directors' meeting to Mr. Darling. The only statements I heard made in his presence was that the company would pay him whenever they had any money to pay but that the little money they were getting—that they all felt it was much more important to pay on taxes rather than on the sprinkling system. And in his absence, when we discussed it, I know it was mentioned that as long as they would sit still and not cause any trouble it was surely better to pay the taxes and not pay them anything.

Q. Wasn't it also stated when he was not present that we didn't believe he could take out the sprinkling system in view of the fact that it had become a fixture?

A. I never said that, I never believed that.

Q. You never made the statement that for that reason you would not advocate paying anything on the sprinkling system [142] contract? A. No.

Q. And you never made the statement that for that reason you would not authorize the company to buy the sprinkling system contract?

A. No, no, the only time the purchase ever came up, as far as I know, was the time I mentioned, when Al. Newton—

Q. Is it not a fact, Mr. Harrah, that in 1941 I also got a tentative offer from Cruickshank Company to sell

(Testimony of John Harrah)

the contract for around \$50,000, and that that offer was considered by the members of the Board of Directors?

A. I never heard of that.

Q. Is it not also a fact that Mr. West went out and talked to Frank Williams, trying to get the company or Mr. Williams to buy an interest, a one-half interest, in the Cruickshank Company contract for \$25,000?

A. Mr. Williams—I know what Mr. Williams told me. He told me that Red West went out to Hollywood Park during the races—some four years ago or five, as I remember it—and talked to Frank and offered to sell him the contract for \$50,000, and that Frank turned him down on it and that then at the same time or a few days later he offered to sell him a half interest in it for \$25,000 and Frank said that he didn't take it.

Q. When the offer was made to the Executive Committee to buy the contract for \$10,000, is it not a fact that you [143] made the statement at that time that you could always buy that contract for practically your own terms and it wasn't worth spending any of the company's money for it?

A. No, I didn't make that statement, no.

Q. And that you would not recommend the payment of any money for the purchase of the contract at that time?

A. No, I didn't say that. I told you what I said.

Q. Now, Mr. Harrah, calling your attention to some time around the first week of June, 1944, is it not a fact that Al Newton came down to the Abbot Kinney Company office on the date—on a Tuesday, I believe it was—on which your regular Executive Committee meetings were to be held and stated to you at that time that Phil

(Testimony of John Harrah)

Davis had an option to purchase the Cruickshank Company contract and that he felt the company ought to buy it for the \$10,000?

A. No, Al. Newton never mentioned it to me except that one time I testified to. He has never said a word, and neither has any one else ever said a word, about it being offered to the company or—

Q. And is it not a fact that he further told you at that time that Phil Davis had told him that Hugh Darling had just phoned and stated that some one was negotiating on the contract and that if we didn't act by the next Monday Mr. Darling would feel no responsibility to Phil Davis, and that he would go ahead and negotiate with these people?

A. No, he never mentioned the contract to me from [144] January, 1943.

Q. And is it not a fact, further, Mr. Harrah, that at that time you told Al. Newton you did not think the contract was worth anything, and that you were sure no one would buy it, and that therefore you would not have anything to do with it?

A. In June, 1944?

Q. In June, 1944.

A. No, on the contrary I had advised a lot of people to buy the contract several months prior to that time.

Q. Were the persons you advised to buy it Mr. Charley Brown and your son William Harrah, and Eddie Gerety?

A. No.

Q. Did you have a conference with Mr. Charley Brown in which you advised him not to buy it?

A. I don't know whether you would call it a conference or not. He asked me—I guess it could probably

(Testimony of John Harrah)

be dignified by that term—he asked me what I thought about it. He said Eddie Gerety wanted him to go in with him and buy that contract.

So I said, "How much will you have to pay for it?" He said Eddie thought he could get it for \$15,000, he wasn't sure. That is the way I remember it.

So I said that—then I probably didn't have the exact amount on the end of my tongue, I don't think I did—but I said over \$100,000 had been due on it for a long time and [145] the company hadn't paid anything on it for years, that they didn't have anything they could pay on it. I said if they got very insistent they might have got a little money along, let some of the taxes go and paid some on the sprinkler contract.

Q. You told Mr. Brown that?

A. Yes, because it was necessary for the property to have a sprinkler contract.

Q. You told Mr. Brown—

A. I told him a lot more. Do you want me to tell you what I told him?

Q. Yes.

A. I said I thought the pier would unquestionably burn down, because we had had innumerable fires there that the sprinkler system had extinguished; and I said that Hugh Darling had represented Red West there and tried to get money on it and the company had promised to pay him, but the way the finances of the company were there wasn't any money to pay him; that is, we thought it was more important to take care of the taxes.

Q. What date was this you had the conference, Mr. Harrah? A. That isn't all I told him.

(Testimony of John Harrah)

Q. But I would like to know the date.

A. Well, I don't know the exact date, but my recollection is it was, oh, two or three weeks before he told me that they [146] had bought the contract.

Q. All right, go ahead now.

A. And I said that at one time Al. Newton said it could be bought for the company for \$10,000 but at that time the company didn't have any money, only had a very small amount of money, and they didn't buy. And I told him once it had been offered to Rusty for \$50,000 —that's what we called Mr. Williams.

And I said, "The contract is all right, the company owes the money; but the big question is how much you can get on it. You can only get what the company has to pay on it. And if the bond issue were foreclosed, which I assumed it would be if anybody bought the contract, and undertook to keep taking the money from the company, that the company might accumulate from time to time, that then he couldn't get any more money on it—he might still own the sprinkling system, after the foreclosure and if he did own it, he would have to deal with the new owners of the property, but they wouldn't be obligated to pay him anything. Then I said the probability was it would be foreclosed, they would start a foreclosure as soon as they knew he bought it.

Q. What made you think they might start a foreclosure just as soon as Mr. Brown had bought it, Mr. Harrah?

A. I haven't finished telling you what I told him yet.

(Testimony of John Harrah)

Q. Well—

The Referee: Come on, let us get along here now. The [147] witness is relating the conversation. What he thought is immaterial.

The Witness: I told him that a few months before that that Frank Williams and Lou Halper, who represented E. I. Robbins in the bond and stock contract, and myself, who represented William Harrah in the bond and stock contract, had discussed the thing, and that they had decided among themselves that it would be a good thing for them to acquire the sprinkler contract and that Lou Halper was authorized to deal with Hugh Darling and see if he could get it.

“But,” I said, “it has been two or three months; and Lou made two or three reports that he hadn’t had any success or something like that, and nothing came of it.”

And—“But,” I said, “that—they would be, in my estimation, in a much better position to own it rather than Charley Brown, Eddie Gerety or anybody who had no connection with that bond agreement, because the bond agreement couldn’t very well be foreclosed—the bonds couldn’t very well be foreclosed unless the parties to that agreement or some of them consented to it, probably applied for it—so that it probably wouldn’t be foreclosed out from under; anyhow the bondholders naturally would want to come in and enforce the claims just to keep the money from their company going to the sprinkling contract. So I don’t think you can probably any more than get your money back, you would be lucky if you did for that reason.” [148]

(Testimony of John Harrah)

I says, "If I were you, I wouldn't go in the deal." That was practically it.

Q. What did Mr. Brown say to you?

A. Oh, he said—he said Eddie—he said some attorney had advised Eddie that it was a good thing to buy; and he said he and Eddie had talked it over quite a little. I think that is about all he did say. He didn't say whether he was going to buy it or whether he wasn't, as I remember it.

Q. Did you contact any members of the Board of Directors then to find out whether the company should make an effort to go out and buy it?

A. No, I did not.

Q. Prior to that time, about two or three weeks before that time, the notice of a special meeting of the Board of Directors of the Abbot Kinney Company had been sent out to the directors, had it not?

A. Well, there was a notice sent out calling a meeting for May 3, 1944, as I remember it.

Q. Yes, and at that time the Board of Directors was composed of whom?

A. Composed of Helen Kinney Ward, Carleton Kinney, Tom Davis, Al. Newton, Lou Halper, and myself.

Q. And of those six members Helen Kinney Ward was back in Oklahoma, was she not?

A. Kansas, one or the other.

Q. So that there were five members within the State of [149] California? A. Yes.

Q. And of those members three of them composed the Executive Committee? A. Yes, they did.

(Testimony of John Harrah)

Q. Now at that time did you or Mr. Carleton Kinney appear at the designated place to hold a meeting of the Board of Directors?

A. I didn't. I don't know whether they did or not.

Q. As a matter of fact, you know of your own knowledge, from what we told you immediately thereafter, that Mr. Carleton Kinney had not appeared?

A. I know from that. But I wasn't there; so I don't know who was there.

Q. And you know we could not constitute a quorum to remove the Executive Committee; is that so—or to carry on any business of the Abbot Kinney Company?

A. That was my belief. I didn't want to hold a meeting unless all of the directors were there. But according to what I heard right after it, you claimed you had held a meeting and abolished the Executive Committee and the manager and many other things.

Q. As a matter of fact, Mr. Harrah, as we left the designated place, the principal office of the company in Venice, we met you at the entrance to the pier and asked you to meet with the Board for the purposes of carrying on the [150] business and you absolutely refused, did you not?

A. Tom Davis asked me to get with them; and I said, "No, I won't meet unless there is a full board."

He says, "We are going to hold a meeting right here."

I says, "You will hold it without me. I am not meeting with you." So I walked away.

Q. As a result you and the other members of the Executive Committee continued with the power which had been allocated to you to continue operating the affairs

(Testimony of John Harrah)

of the company during the period when the Board of Directors did not meet?

The Referee: Go ahead, Mr. Davis. This is a lot of conversation. Let us get some evidence.

Mr. Davis: Q. How long have you known Charley Brown?

A. I think I got acquainted with him right after he came to Venice.

Q. That was 1919? A. I think so.

Q. Have you had any business dealings with him?

A. Well, the only business dealings I ever remember having with Charley Brown I once sold him the equities in four houses in Los Angeles; that is, there weren't any equities, but I held title to them. And he gave me \$500 for them, and the mortgagees all took them away from him.

Q. After you filed a petition in bankruptcy, did Mr. Brown start representing your son William Harrah in various [151] matters? A. No.

Q. When did he start representing your son William Harrah in matters—

Mr. Kitzmiller: Assuming he did.

The Witness: I don't know whether he ever did. He worked for him several times.

Mr. Davis: Q. When did he start working for William Harrah?

A. The first I have any recollection on now I think was in 1935.

Q. What was that employment?

A. Well, my son and daughter had some games in the Plaza Building in Venice; and that was during prohibition. And they had a little bar there in the building

(Testimony of John Harrah)

and they gave some of their patrons free drinks. So Bill Harrah had Charley Brown to look after that. As far as I remember, that is the principal thing he did. I don't know whether he did anything else or not. But I remember he did that. It was a little more interesting there with the beer in it, and those customers of the games who liked to drink once in a while would be invited in and he would give them a drink or two.

Q. Now at the time Charley Brown obtained the lease on the Robbins Building, did you have any negotiations with him? [152] A. Did I have any with Charley?

Q. Yes. A. No.

Q. Who carried on the negotiations with Charley Brown for the Robbins Building lease?

A. Well, he came in there to the Executive Committee and asked for the lease—I heard him testify here he talked to Eddie about it first.

Q. Was that the first time you knew Charley Brown was interested in the Robbins Building lease, was when he came into the Executive Committee meeting?

A. No, that wasn't the first time, because he talked about wanting to move over there. That building had been vacant for a long time, and he thought it was a good location for a game, which I guess everybody down there agrees with. And he said he didn't like the spot he had over there and he wanted to make a deal on it.

He spoke to me—I don't know whether it was before he spoke to Eddie Gerety or afterwards, I don't remember that. I remember he just asked me what it could be rented for and so on. I remember he asked me if Robbins owned the building and I said no, that it was built on a ground lease and the lease was up, the building be-

(Testimony of John Harrah)

longed to the Abbot Kinney Company. I told him if he wanted to make a proposition to make it to Eddie. I don't remember whether he said he talked to Eddie or not. That was about it. [153]

Q. Where was he operating before then?

A. That was in the Plaza Building.

Q. Did he have the lease from you or from William Harrah?

A. No, I don't think at that time—I think he had—I think he was paying his rent to the Abbot Kinney Company. That is my recollection. That was another ground lease proposition. And the Abbot Kinney Company got that building back in 1941—1941 or 1942, I don't know. But Charley wasn't paying any rent to William Harrah. He must have been renting it from—

Q. Who owned the equipment?

A. William Harrah in the old location.

Q. And he was paying William Harrah the rental for the equipment, wasn't he?

A. I don't remember whether he was. William Harrah was around here a lot about that time. He isn't any more. He was here—up until a couple of years ago he was here a great deal.

Q. Was that turned over to the Robbins Building after the lease was entered into?

A. Only a portion of it. In fact, I don't think it was part of what was in out there. I think it was some that was stored in the rear of the building, because it was a different form of a game; and Charley had been operating in that old location before he quit there. My recollection is now the Police Commission revoked his permit, and that he made an [154] application for a

(Testimony of John Harrah)

different game over in the new location and he needed some old equipment that William had to use in connection with the new game, part of the equipment.

Q. Do you receive any money from the operations of the Robbins Building? A. No, no.

Q. Does William Harrah receive any money from the operation of that building? A. No.

Q. Or the operation of the game there?

A. No, William Harrah has nothing operating down there at all unless the Abbot Kinney Company can be called an operative property.

Q. Does he receive any money from it? A. No.

Q. Has he ever received any money from the operation of the game in the Robbins Building since Mr. Charley Brown obtained a lease?

A. No, not since nor before. He had nothing to do with Robbins or Charley.

Q. Have you received any money?

A. I have from Robbins as an attorney; I never received any from the operation of anything.

Q. Have you received any from Mr. Brown under—

A. Yes, I received \$2,000 from Mr. Brown.

Q. When was that? [155]

A. That was in September of last year.

Q. Now when was the first time you knew that this contract had been purchased by Charley Brown?

A. Well, I presume it was within a day or so. The first I knew it, Charley Brown told me they purchased the contract, and I presume it was within a very short time that they did it.

Q. Did he tell you who purchased it?

A. He said he and Eddie.

(Testimony of John Harrah)

Q. Did he tell you what they paid for it?

A. Yes, he said they paid \$15,000 for it.

Q. When was the first time he requested that something be paid on account?

A. I think when he came into that meeting just after he purchased it, within a week or so.

Q. Within one week?

A. I think about a week or ten days after they purchased it he came in and—I have no recollection of him saying anything to me about payment until he came in there that day.

Q. Who was present at that meeting?

A. Well, Carleton and I were there. I don't know whether Mr. Gerety was there or not. I heard Mr. Brown testify he was not. But—Mr. Gerety was present at some of the Executive meetings, and some of them he wasn't. I don't think Al. Newton was there, but I know that after they held that—tried to hold the Directors' meeting on May 3rd—that Al. [156] Newton used to come into the Executive Committee meetings sometimes and say that he didn't think there was any Executive Committee and he was only there to see what transpired and that he didn't want to be listed as present or having anything to do with it. But I have no distinct recollection.

Q. What did Mr. Brown say to you at that time?

A. Oh, he said he wanted some money on the thing and started talking about the contract provided for a \$30,000 payment every year, and that there already was a notice to the company that Cruickshank was going to turn the water off.

(Testimony of John Harrah)

Q. Did you know about that notice?

A. Yes, I knew about it.

Q. When was that notice served on the company?

A. I don't know that it was servd. I think it came by mail. You might call that a service.

Q. When did it come through the mail to the company?

A. I couldn't tell you that; I don't know.

The Referee: Q. Give us your best recollection.

A. I think it was—

Mr. Kitzmiller: Would you like the exact date? It was the 6th or 7th of June—I believe I have a copy of it.

Mr. Davis: The 6th or 7th of June that the—

Mr. Kitzmiller: June 6, 1944.

Mr. Davis: Q. Did you see a copy of the notice, Mr. Harrah?

A. My recollection is that two of them came to the Abbot [157] Kinney Company in separate envelopes within two or three days of each other, and that—Eddie Gerety called it to my attention and gave me one of them. I don't remember the exact date when it was received. As I remember it, it was about the middle of June; but I might be mistaken. I think it was mailed from New York. That is my recollection; I might be mistaken about that.

Q. Did you see it before or after you had your conference with Mr. Charley Brown regarding the Cruickshank contract?

A. You mean when he asked me my opinion about it?

Q. Yes.

A. It was after that. Long after that.

(Testimony of John Harrah)

Q. It was long after that that you saw that letter?

A. Yes.

Q. Now you heard Mr. Brown testify this morning that after his first conference with Mr. Darling and before he purchased it he talked to you again about the purchasing of the contract. Do you recall where that conversation took place?

Mr. Kitzmiller: I don't recall such a conversation.

The Witness: Only one, as I remember.

Mr. Davis: Q. I think the testimony was this morning—I asked him if he talked to Mr. Harrah after he talked to Mr. Darling—

A. He didn't talk to me but once.

Q. He only talked to you once? [158]

A. Only once before he bought it. When he talked to me, he and Eddie were thinking of buying it.

Q. Did he tell you they were then negotiating with Hugh Darling about it?

A. My recollection is that—I asked him what they were going to pay for it, and he said Eddie thought they could get it for \$15,000. That is all I remember about it. I think I told him then—I know I told him about Lou Halper negotiating for it and that Lou had been authorized to offer \$15,000.

Mr. Cobb: Mr. Davis, are you going to put that letter in? You have shown it to the witness.

Mr. Davis: Yes, in just a minute.

Q. Did you tell him at that time that Cruickshank had declared an intent to turn off the water?

Mr. Kitzmiller: He couldn't have.

The Referee: Let us not argue.

(Testimony of John Harrah)

The Witness: No, I didn't tell him. I didn't know anything about it. When I first saw this letter was the first I had heard about their intention.

Mr. Davis: Q. I call your attention to a letter dated June 6, 1944, F. R. Cruickshank Company, directed to the Abbot Kinney Company, and purportedly signed by H. B. Dorr, and ask you if you have seen this or a copy of this letter? A. Yes.

Q. Where did you see that? [159]

A. I am not reading this; but I have seen one that looks like it. I presume it is the same.

Q. Where did you see that?

A. Mr. Gerety handed it to me in the office of the Abbot Kinney Company.

Q. Do you recall approximately what date that was?

A. About the middle of June.

Q. What did Mr. Gerety say to you at that time?

A. He just said, "Here is a notice from Cruickshank Company."

My recollection is it was received just about the time that Charley Brown told me that he and Eddie had bought the contract.

Q. Did Mr. Gerety tell you at that time that they were negotiating for the contract?

A. No, he never told me they were negotiating for the contract.

(Testimony of John Harrah)

Q. The purchase was made on the 13th of June? Does that refresh your recollection as to when Mr. Gerety gave you that? A. The purchase was made when?

Q. The 13th of June, 1944, as I remember it.

A. Well, my recollection is it was about that time. I don't know whether it was just before or just after.

Q. Mr. Gerety just handed it to you; and didn't he say anything further other than "Here is a letter from Cruickshank [160] Company"?

A. Oh, I think he did say something. I think—I might be mistaken. I have a recollection that he did say something, but I am not so positive about it.

Q. What is it your recollection that he said?

A. My recollection is that he said he called Hugh Darling on the phone as soon as he got this and asked him about it and it meant what it said, that they were not going to stall around about it, or something like that.

Q. Did you call Hugh Darling or make any inquiry as to what they intended to do?

A. I hadn't talked to Hugh Darling or communicated with him in five years, I guess.

Q. Is it not a fact, Mr. Harrah, that you and Mr. Carleton Kinney were in fact running the Abbot Kinney Company at that time?

A. No, we weren't running it.

(Testimony of John Harrah)

Q. You stated, did you not, that Mr. Alfred Newton did not appear at any of these Executive Committee meetings because he felt that—

A. No, I didn't say that. I said that two or three meetings, that's my recollection, after that attempted meeting of the Board of Directors on May 3rd, that Al. came in and said, "I am not here, because there is no Executive Committee," but after that he started functioning and taking his part again. [161]

Q. At that time, then, you made no inquiry, no effort to find out what the contract status was?

A. What the contract status was?

Q. That is right. You made no inquiry of Hugh Darling as to whether the contract could be purchased for the company or anything about it?

A. No, I didn't communicate with Hugh Darling. My recollection is the first I saw of this was after Charley said they had bought it.

Q. You did not see this until after Charley had told you they bought it? A. I don't think I did.

Q. Then when Eddie Gerety handed it to you, what did he say?

A. Well, I don't remember exactly what he said.

The Referee: Mr. Davis, you are offering that?

Mr. Davis: Yes.

The Referee: Bankrupt's Exhibit 7.

(Testimony of John Harrah)

The Witness: Oh, I think he said—I am not at all certain about him saying he called Hugh Darling. I have a recollection—it is very faint—I remember this: He said he received two altogether and asked me if I wanted one. I said, "Yes, give it to me."

The Referee: Q. Did he say he and Mr. Brown had purchased the contract?

A. He wasn't the one that told me that. [162]

Q. I am asking you if he did. When he handed you this letter did he say, "Mr. Brown and I have purchased this contract" or anything to that effect?

A. I think at the time the letter was received that I knew they had purchased the contract and Eddie said, "Well, this saves us the bother of giving a notice" or something.

I said, "You don't want to give any notice, do you?"

He said, "Well, I want to collect some money one way or another."

The Referee: We will have to take an adjournment, gentlemen. That document was marked Bankrupt's Exhibit 7.

Mr. Brown: I would like to correct a statement I made.

The Referee: You will have a chance tomorrow morning. Court is adjourned. [163]

Los Angeles, California. Wednesday, July 25, 1945.
10:00 o'clock, A. M. session.

JOHN HARRAH,

recalled for further

Direct Examination

By Mr. Davis:

Q. Mr. Harrah, about that payment of \$7500, before you made the payment of \$7500 to Mr. Brown on the contract, did you contact any of the other members of the Board of Directors as to whether that payment should be made?

A. None other than Carleton Kinney, a member of the Executive Committee, as far as I remember now.

Q. You did not call Lou Halper and ask him if any should be paid? A. No.

Q. Did you call Mr. Davis and ask him if any should be paid? A. No.

Q. You called none of the members of the Board of Directors? A. I did not.

Q. And yet you knew at that time, did you not, that there had been an attempt made to call a meeting of the Board of Directors for the purpose of terminating the authority of the Executive Committee of which you were a member? [164]

A. Well, I don't know what purpose they called the Directors' meeting for. I know they made an attempt to hold a Directors' meeting.

Q. You know one of the attempted actions they took was to attempt to terminate the Executive Committee?

A. I was told afterwards that your brother Tom had so notified Mr. Gerety.

(Testimony of John Harrah)

Q. And that was prior to this payment in June of \$7500, was it not?

A. That was in May, the 3rd of May, I think.

Q. And you received notice of the attempt to terminate the Executive Committee's authority immediately after that meeting was held; isn't that so?

A. I was informed of it, as I told you, that Mr. Gerety said your brother came in the office that evening, I think, just before closing time and said they had held a Directors' meeting and he was fired and—Mr. Gerety he was speaking to—and the Executive Committee was dissolved and Tom Davis was president. And I think he mentioned you were the other officer—I don't remember that. Mr. Gerety told me that.

Q. So that, knowing the temper of the other members of the Board of Directors, you did not call then to see whether they felt it was proper to make any payment on account of this sprinkling system contract?

A. Those three, no, I didn't call any of them.

Q. And you did not call Al. Newton, did you, and ask [165] him if it was all right to make the payment?

A. He was one of the three.

Q. Did you call Helen Kinney Ward back in Oklahoma and ask her if it was all right?

Mr. Cobb: We object to that on the ground that the question has been asked and answered.

The Referee: He says he did not call anybody.

Mr. Davis: All right.

The Referee: Q. Did the corporation have an attorney at that time, Mr. Harrah?

A. They didn't have any regular retained attorneys. If they had business, they gave it to somebody to handle.

(Testimony of John Harrah)

Q. You had no regular attorney?

A. No, no retained attorney.

Q. I see. I think you testified that you saw Bankrupt's Exhibit 7 before the payment of \$7500 was made. Was that your testimony?

A. Before the payment was made.

Q. That is the letter from Cruickshank.

A. Yes, I saw that before the payment of \$7500 was made.

Q. Did you ask for any legal advice on the matters mentioned in Bankrupt's Exhibit 7 before you made—

A. That one you showed me?

Q. No—

A. No, I didn't ask for any legal advice on it.

The Referee: Go ahead. [166]

Mr. Davis: Q. Who was the attorney representing the company at that time on the matters as they came up?

A. Well, I don't remember. There wasn't any rule on it. I think Mr. Pool had represented the company on the important matter of collecting \$20,000 insurance on a building that was burned. That had been a year or so prior to that. I don't remember at that time that there was anything—I remember—I remember I myself answered a complaint on a little damage suit out on the Pony Ride there for the company.

Q. Well, as a matter of fact, Mr. Harrah, Mr. Pool was the only attorney representing the company at that time; isn't that so? A. I don't know.

Q. Other than yourself?

A. I don't remember at present. I might be mistaken, but I don't remember the company employing anybody else other than Mr. Pool for the last couple of years.

(Testimony of John Harrah)

Q. You knew when this petition in bankruptcy was filed?

A. Well, I read it in the newspapers a day or so after.

Q. You read it the next day? A. I presume so.

Q. And immediately thereafter did you hold an Executive Committee meeting for the purpose of determining what action the company was to take in defending that proceeding?

A. I don't know—immediately thereafter? I presume it came up at the next regular meeting. I remember we retained [167] Mr.—I think Hiram Casey and Mr. Pool—to represent the company. I presume it was the next regular meeting. That is the way I remember it now.

Q. That was done on October 24, as I recall; is that correct? Was that done on October 24th?

A. If you have the minutes there, that would be correct. I don't know. I couldn't tell you from memory.

Q. Will you look at this, please?

A. Yes, that is right, October 24, 1944.

Q. You then employed Mr. H. B. Pool and Hiram Casey to represent the Abbot Kinney Company in Bankruptcy proceedings? A. That's right.

The Referee: I beg your pardon, I did not get that date?

Mr. Davis: October 24, 1944.

Q. Now you know that a special meeting of the stockholders of the Abbot Kinney Company was called for November 8th, 1944?

A. Yes, if that's the date.

Q. And your son William Harrah has a—certain stock—did have—under an agreement dated December 23, 1937, with the Abbot Kinney Company as of the

(Testimony of John Harrah)

date of the giving of the notice of the special meeting of the stockholders?

A. Well, I don't know. From a legal standpoint I don't know whether he did or not. Such a contract had been executed.

Q. And under the terms of that contract he would be [168] entitled, I assume, would he not, to notice of the special meeting of the stockholders?

Mr. Kitzmiller: That would call for a conclusion as to whether or not—

The Referee: Sustained.

Mr. Davis: Q. But a notice of that meeting was sent to Mr. William Harrah, was it not?

A. Not as far as I know. I never heard of it if it was.

Q. When did you first learn that the special meeting was to be held?

A. Well, it was just a few days before it was held. I was not a stockholder. No official notice was given to me.

Q. Well, as a matter of fact, Mr. Harrah, a letter was sent to your son William Harrah requesting him to give instructions to the trustees under that agreement as to how they should vote; isn't that so?

A. I don't know. I don't know about that.

Q. Did Mr. William Harrah talk to you regarding it?

A. He talked to me regarding it, yes. But I called him up. I remember that. I have no recollection now of him ever having mentioned receiving any notice.

Q. That meeting was set for November 8, 1944, which I believe was a Wednesday—

A. I think that's right.

(Testimony of John Harrah)

Q. —do you recall that date?

A. I think that's right. I believe it was. [169]

Q. And you held a meeting of the Executive Committee on November 8th?

A. Yes, that's right; Tuesday was our regular meeting day.

Q. And at that time what did you do regarding the sprinkling system contract, if anything?

A. We handed in an agreement with Charley Brown providing that they wouldn't turn the water off for a year if we would pay them \$30,000 and get a credit for \$50,000 on the amount due.

Q. Was that offer made in writing? A. Yes.

Q. I call your attention to Bankrupt's Exhibit 4 and ask you if you have seen that document before?

A. Yes, that is the proposition he submitted there that day.

Q. What did you say to Mr. Brown when he presented that proposition to you?

A. Oh, Carleton Kinney and I talked to him and asked him if they wouldn't take less money than that. And I told him he was pretty lucky to be able to collect any amount of money like that; that the company had had a year like it had never had before since I had had anything to do with it. He said no, they wanted the contract carried out according to the terms but they were willing to make a concession and give \$20,000 additional credit. Otherwise they would turn the [170] water off and then they didn't know what they would do.

Q. Was Mr. Eddie Gerety present at that time?

A. Well, I am not certain whether he was or not.

(Testimony of John Harrah)

Q. He attended most of those Executive Committee meetings, did he not?

A. He was often there but he wasn't always there.

Q. And he was familiar with the financial status of the company?

A. Oh, yes, I presume so. He always knew how much money they had on hand.

Q. Mr. Harrah, you adopted a procedure down there in regard to the carrying of the money in that you would have the receipts deposited in an account and then you would have the money withdrawn and put in the cashier's checks and those cashier's checks turned over to you for supposed safe keeping; is that correct?

A. Well, I had—there was a judgment against the company of about \$15,000, I think, on a person injury case. It was on appeal, and no bond was up. So I didn't let a lot of money get in the bank. We would take that sum out in cashier's checks made to the Abbot Kinney Company.

Q. Why were you particularly concerned about that judgment?

A. Because we didn't want them to attach the whole bank account and put the company out of business as far as being able to operate was concerned. [171]

Q. How much would you carry in your bank account on an average?

A. Well, I couldn't tell you that. I didn't pay any particular attention to it, but I think—oh, anywhere from five to ten thousand dollars, something like that.

Q. You would carry that in the bank account?

A. I think so.

(Testimony of John Harrah)

Mr. Kitzmiller: Wouldn't that all be irrelevant unless we get down to, say, June and November of 1944 as to how much the company carried in bank accounts on an average throughout a period of time?

The Referee: The objection is overruled. Go ahead.

Mr. Davis: Q. Did you carry that average, you say, of between five and ten thousand dollars in the account—

A. I am just making a guess, Mr. Davis, mostly a guess.

Q. Was that after you had taken out these cashier's checks you would still have that account?

A. He always had an account. I couldn't tell you positively how long Mr. Mapes would credit. The book-keeper did that.

Q. You did take those checks, then, and you would have them in your possession or under your control?

A. Yes, I was the treasurer of the company; so I held the checks.

Q. What amount of checks did you hold as of November 7, 1944? [172]

A. I don't remember that; there were quite a number of them.

Q. Close to \$30,000, a little more maybe?

A. I don't know.

Q. How did Mr. Brown learn that you had about \$30,000 available for payment on account of the sprinkling system contract?

Mr. Kitzmiller: Just a moment, I object to that on the ground that it assumes facts not in evidence. There is no evidence to show Mr. Brown learned he had \$30,000.

The Referee: Overruled.

(Testimony of John Harrah)

The Witness: I don't know how I learned, but I could make a good guess.

Q. Well, you made the statement just a moment ago, Mr. Harrah, that you told him he was pretty lucky to be able to collect that amount, because the company hadn't made so much money before. Did you tell him also at that time how much money the company had available?

A. No, I never told him how much money the company had any time.

Q. But you just made that general statement, which led him to believe that there was \$30,000 available?

A. Oh, no. I assumed at that time that he knew that there was \$30,000 available. I don't know he did, but I assumed he did.

Q. Did you assume that because he had made the demand for [173] \$30,000?

A. Yes, I didn't suppose he would make a demand for something the company didn't have.

Q. If he had made a demand for \$50,000, would you have made that same assumption?

A. No, I would have thought if he had he was mistaken, because we didn't have that much money.

Q. But the fact that he made a demand for \$30,000 and that happened to be almost the exact amount the company had, that made you think he had other information?

Mr. Cobb: We object to that on the ground that it assumes facts not in evidence.

The Referee: Overruled.

The Witness: What was the question?

(Testimony of John Harrah)

Mr. Davis: Mr. Reporter, will you please read the question?

(The reporter read the question.)

The Witness: I don't think that was the exact amount the company had. I don't remember now what the company had; but my recollection is it was close to \$40,000. I might be mistaken. I assumed that—if you want to know what I thought, I thought probably Eddie Gerety had told him how much money was on hand. He was with him. He didn't tell me what he knew, but I could have made that guess when I was six years old.

Q. What did you say to him when he stated he wanted [174] \$30,000?

A. Oh, we talked to him. Carleton and I talked there quite a little while with him.

Q. Just what did you say, Mr. Harrah?

A. I couldn't tell you the words I said.

Q. I want just approximately.

A. We discussed with him, as I say. I said, "Well, you and Eddie are pretty lucky to get this thing when the company has got a prosperous a year ahead of it as it has; and you ought to give a little better terms. There hasn't been anything paid on it in a long time except when you got \$7500."

And he said he and Eddie had talked it over and they wanted it put on the basis it was agreed to be put on, which was \$30,000 every twelve months; but he said they would give an additional credit of \$20,000.

Q. Didn't you point out to him that they had already received \$7500 on it the short time they had had it and

(Testimony of John Harrah)

that, under their theory, they were not entitled to \$30,000 for that payment?

A. Yes, we talked about that; and he said well, when the \$7500 was paid they gave an agreement they wouldn't turn the water off for three months, which was at the rate of \$30,000 a year. And the three months was up. In fact he had been in there before that. I remember now he came in—that first payment, I think, was made about the 20th of June, I think. He came in about the 20th of September, right around [175] that, when the three months had expired, and wanted to know what we were going to do about additional payments. So we just talked then, and we didn't do anything, just talked about it. And then he came back on the 7th of November.

Q. You knew then that a special meeting of the stockholders was being held on the 8th of November for the purpose of electing a new Board of Directors. Why didn't you wait on that payment until after it had been determined whether a new Board had been elected?

Mr. Cobb: We object to that on the ground that it is argumentative and calls for a conclusion of the witness.

The Referee: Overruled.

The Witness: I didn't think there would be any meeting of the stockholders for the reason that in that contract you just mentioned it provided 56,000 shares of stock in that contract couldn't be voted at the meeting without the unanimous consent of all parties to that agreement. Without that being voted, there couldn't be a quorum. That had been attempted once before, and at that time several of the parties to the agreement were sup-

(Testimony of John Harrah)

posed to hold a meeting. And I didn't think there would be any meeting of the stockholders.

Mr. Fitzmiller: We have been talking about this contract back and forth. I wonder if counsel has a copy and if it can be introduced in evidence?

The Referee: You may introduce it when you get to your side of the case. Go ahead, please. [176]

Mr. Davis: Q. As a matter of fact, you know that all the parties to that agreement, other than William Harrah, were the ones that were moving, that were asking for, that special stockholders' meeting; isn't that so?

Mr. Kitzmiller: I object to that on the ground that it is not the best evidence. You are talking about an agreement, and the best evidence as to the agreement and who were the parties, irrespective of who was moving to do anything, is the agreement itself.

The Referee: Overruled. The answer may stand. Go ahead.

Mr. Davis: Q. As a matter of fact, Frank Williams and you had hardly been speaking to each other as the result of your activities on the pier; isn't that so?

A. No, that is not so.

The Referee: Q. May I ask that Frank Williams, whose name has been mentioned a number of times, be identified? Who is Frank Williams.

A. He was commonly known as "Rusty" Williams. He was formerly on the police force of the City of Los Angeles, and he was one of the parties to this bond and stock agreement and interested in it.

Q. He was a substantial party and had a substantial interest? A. Yes.

(Testimony of John Harrah)

Mr. Davis: Q. As a matter of fact, held one of the biggest single interests in the bond pool, did he not?

A. He held the biggest single interest in the bonds in the company.

Mr. Cobb: Q. As one of the petitioning creditors and since the filing of the petition he is deceased; isn't that correct?

Mr. Davis: That is correct. He just recently died.

The Referee: Go ahead.

Mr. Davis: Q. Now at the time this demand for the \$30,000 was made, you had attorneys of record representing the Abbot Kinney Company, Harold Pool and Hiram Casey, did you not?

A. Why—

The Referee: You have gone into that.

Mr. Davis: I just want to approach it—

The Referee: He has already testified as to the legal representation.

Mr. Davis: Q. Did you contact your attorneys to determine whether you had the right to make a payment of \$30,000 when the company was also in a bankruptcy proceeding? A. No, I didn't question it.

Q. And you made no inquiry of either Mr. Pool or Mr. Casey?

A. No, I didn't make any inquiry of anybody. I thought I had the right to pay it.

Q. You knew that the petition had been filed at that time? [178]

A. Yes, I knew it had been filed. It had been discussed, and nobody thought it had any merit at all. The petitioners were not even creditors of the corporation.

Mr. Davis: I move that be stricken.

(Testimony of John Harrah)

The Referee: Proceed.

Mr. Davis: Q. So when this question of the payment of the \$30,000 came up, did you contact any of the other directors of the company?

A. No, I didn't contact any directors. We never had any habit of contacting directors on the meetings of the Executive Committee. We went ahead—

Q. Even though it meant the payment of a sum of \$30,000?

A. We had never paid out \$30,000 before that I remember. But when we held Executive Committee meetings, we never called up the directors to see what they thought. The only time I remember any contact between the directors and the Executive Committee was the time I related, when Lou Halper called up and said not to buy that sprinkler contract for \$10,000 when Al Newton said it could be purchased at that time. Outside of that all the meetings the Executive Committee had I don't remember—

Q. You knew as the result of that statement of Lou Halper's that he was opposed to the payment of anything on account of that contract? A. No, I did not.

Q. So after you had your conference with Mr. Brown, what [179] did you do about payment of the amount requested by him?

A. Well, after we got through discussing it, we voted to accept his proposition.

Q. Now who were present at that time at the Executive Committee meeting?

A. Well, Carleton Kinney and I were there, and Charley Brown was there; and I don't know whether Eddie Gerety was there or not.

(Testimony of John Harrah)

Q. Do you recall any statements made by Eddie Gerety at that time regarding the amount of money available?

A. No, Eddie didn't do any talking to the Executive Committee at all about that contract, any more than to say that he had a third of it. He let Charles do all the talking.

Q. So you knew at the time you paid the \$30,000 that Eddie Gerety held a third interest in the contract?

A. I knew that. At least I was told that by Charley Brown at the time Charley Brown told me they had bought the contract several months before.

Q. Did you make any inquiry of Eddie Gerety as to whether he held it?

A. No, he told me, too, later.

Q. Eddie Gerety told you that before you paid this \$30,000?

A. He told me—the first time I—after Charley Brown told me, perhaps two or three days, four days, something like that. [180]

Q. I call your attention to Bankrupt's Exhibit 5 and ask you if you have ever seen that check before?

A. Yes.

Q. And is that your signature, "John Harrah"?

A. Yes.

Q. You signed that check for \$30,000?

A. Yes, I signed it.

Q. And then what did you do with that check?

A. I left it in the office there.

Q. Did you deliver it to Charles Brown?

A. No, I didn't.

(Testimony of John Harrah)

Q. Do you know who did deliver it to him?

A. I don't know for certain. I presume, according to the custom of the company, the bookkeeper usually did all those things.

The Referee: Where is the office of the company that you keep referring to?

A. Right at the head of the Venice Pier, just as you go onto the pier. It is on the left-hand side.

Q. Is it on the ocean side or on the land side?

A. Ocean side.

Q. On which side of the pier as you go up?

A. The left-hand side.

Q. On the left-hand side? A. Yes.

Q. That is right where the big Ride is, is it not? [181]

A. Just beyond the Ride.

Q. Beyond the Ride?

A. First building beyond, the rear of the building.

Q. Where is the Security-First National Bank at Venice?

A. That's a little over a block away, at the other end of Windward Avenue.

Q. Which is Windward Avenue, the one that runs into the pier?

A. Yes, the one that runs into the pier; and the Security Bank is east of the ocean front, of course. First you come to the Speedway, which is an alley; next you come to what we call the Trolley Way, which they also call Pacific Avenue. And just across from that, on the corner, is the Security Bank.

The Referee: Go ahead.

(Testimony of John Harrah)

Mr. Davis: Q. As I understand it, Al. Newton was not present at that meeting?

A. No, he wasn't there.

Q. And you did not contact Al. Newton to obtain his opinion as to whether that sum or any sum should be paid on the contract? A. No, I didn't ask him.

Q. Now in order to meet the payment of that check of \$30,000, what did you do? A. What did I do?

Q. Yes. [182]

A. I didn't do anything.

Q. You had certain checks in your possession. What did you do with those checks?

A. The cashier's checks?

Q. That is correct.

A. I always delivered those to the bookkeeper whenever he asked for them. So I delivered some to him whenever he wanted—

The Referee: Q. Mr. Harrah, just tell us what you did on this particular occasion. You have already testified that you did not keep—at least in substance you have testified that you did not keep—as much as \$30,000 in the bank account? A. Yes.

Q. You issued this check for \$30,000. What did you do in this particular instance?

A. Perhaps I didn't state it clearly. I don't have any definite recollection; but whenever there was money needed in the bank to meet checks drawn or contemplated beyond what was in there, I gave these cashier's checks back to the bookkeeper.

(Testimony of John Harrah)

Q. Now in this instance the moment you signed that check you knew that there wasn't money in the bank to cover it. What did you do?

A. That is what I did then. I have no distinct recollection of it, but that is where I would get the money.
[183]

Q. Whom did you give it to? A. Mr. Mapes.

Q. What is his name?

A. His name is Mapes, M-a-p-e-s. He did all the banking as far as I know.

Q. Do you know what hour of the day it was that you handed that check to Mr. Brown?

A. I didn't hand it to him. But this meeting—I think the regular hour for holding the meeting was 2 o'clock. And I presume we were there for a half hour or so.

Q. Yes.

A. So I don't know whether he got the check that day or whether he got it the next day or when he got it.

The Referee: I see. Go ahead.

Mr. Davis: Q. But under any circumstances you saw to it that enough property was put into the bank to meet this check for \$30,000? A. Yes, that's right.

Q. How did you hold out any other cashier's checks?

A. I don't remember.

Q. Do you know how much total money the company had left after you paid out this \$30,000?

A. I don't know now; I knew then, but I have forgotten the amount.

(Testimony of John Harrah)

Q. Well, if I should tell you it was around \$2500, would that refresh— [184]

A. Well, it seems to me I have a recollection of about \$7500. But I might be wrong about that. Perhaps it might have been another cashier's check. I am not certain, as I say.

Q. Well, those records will show. That was my impression. I may be in error on it. Now in your minutes of the meeting of November 7th—(addressing counsel) I believe you gentlemen have inspected these; I don't want to introduce these in evidence if I can avoid it, but I will read it—It provides as follows:

"Charles J. Brown submitted a written proposition for the company to pay him \$30,000 on the sprinkler contract, and the proposal was accepted and the president instructed to sign an acceptance for the company on the letter submitted, and the manager was instructed to pay the \$30,000 and to prepare an additional copy of the proposal to attach to these minutes and also one to be signed by Mr. Brown and the Abbot Kinney Company by the president and delivered to Mr. Brown."

Now is that substantially what took place at that time, Mr. Harrah?

A. As I remember it. You mean is that—you mean were such instructions as that given?

Q. Yes. A. I think so. [185]

Q. And when it refers to the manager, it refers to Eddie Gerety? A. That right.

Q. Now who gave those instructions to Eddie Gerety?

A. Well, we just did that. Carleton Kinney and I did it, that's all. I don't know—if Eddie was there,

(Testimony of John Harrah)

he got the instructions there. If he wasn't, he got them when the minutes were written up. I don't know; he would know.

Q. Were those minutes written up that afternoon?

A. I couldn't tell you that positively.

Q. Were they written up before this check was actually drawn?

A. Well, yes, I would say they were written up—I couldn't say positively, the girl writes all those minutes down there. Probably the minutes were signed the same time the check was signed.

Q. You will note that this check is dated November 8th, 1944. Is that the date on which the check was actually drawn?

A. I don't know, but I presume so.

Q. And was it drawn in the morning or in the afternoon?

A. I don't know. I didn't write the check. Mr.—

Q. When did you sign it?

A. I signed it whenever Mr. Mapes presented it to me. I don't know whether it was the day of the minutes or the day after.

Q. It is dated November 8th. Was it signed before or [186] after the stockholders' meeting which was at 2 o'clock on November 8th?

A. It was signed before that.

Q. So it was signed on the morning of the stockholders' meeting of November 8th; is that your testimony?

A. If it was signed on the 8th, it was signed in the morning. If it was signed on the 7th, it was signed in the afternoon.

(Testimony of John Harrah)

Q. And it was actually delivered to Mr. Brown then, before the stockholders' meeting?

A. I don't know. I didn't give it to him.

The Referee: Pardon me, will you let me see the minutes that you read? I would like to read them, Mr. Davis.

Mr. Davis: Yes.

Q. Did you at that time, at the time of the meeting of the Executive Committee, when Mr. Brown was before you, ask Mr. Brown what he would take to sell that contract and settle it in full?

A. I don't think we discussed it.

Q. No mention was made of it?

A. I wouldn't say there wasn't any mention made of it, but I don't have any distinct recollection of it.

Q. Did you mention or discuss with Mr. Brown the fact that he had only paid \$15,000 for the contract?

A. Oh, yes, we mentioned that.

Q. Who is Eddie Gerety? [187]

A. The gentleman sitting right there.

Q. And who is he in relation to the Abbot Kinney Company?

The Referee: Those things have been stipulated to, Mr. Davis. Let us get along.

Mr. Kitzmiller: All that was stipulated to was that he was an employee.

The Referee: He was general manager; so stipulated.

Mr. Kitzmiller: That is his title.

The Referee: Gentlemen, I went over these pleadings, and you stipulated it was true he was general manager until December 13, 1944. Proceed.

(Testimony of John Harrah)

Mr. Davis: Might I go into the question of how long he was general manager, your Honor? That is the only thing I was getting at.

The Referee: You have stipulated that E. A. Gerety was an employee of Abbot Kinney Company for many years and from 1937 to December 13, 1944, was its general manager.

Mr. Davis: I think, if you recall, the statement was made that he had been there prior thereto; and I would just like to show his position for over a period of many years.

The Referee: Isn't 1937 long enough? What do you have in mind?

Mr. Kitzmiller: We are going into that, his powers and duties as general manager; and if it is along that line, I am telling you when it comes to putting Mr. Gerety on the stand, I will go into his powers and duties to see what this [188] title of general manager meant and whether or not he had any fiduciary relationship with that corporation.

The Referee: Are you going to argue that a general manager of a corporation, who bears that title and is active in the corporation, is not in a fiduciary capacity regardless of what his duties are; that he may acquire a claim against the corporation the same as an absolute stranger? Are you going to argue that?

Mr. Kitzmiller: Certainly. I am going to argue it, and the mere fact that—

The Referee: We will permit you at the time to make an offer of proof and will rule on whether or not it is relevant and competent. Go ahead, please.

(Testimony of John Harrah)

Mr. Davis: Q. Now after this \$30,000 was paid on account, did you have any contract with Mr. Brown regarding the balance due on the contract and the possible purchase of an interest in it by William Harrah?

A. Yes.

Q. When did that conversation take place?

A. Well, that was, oh, probably the 20th of November, right around that.

Q. Where did you meet Mr. Brown?

A. Oh, I don't know. I am liable to run into him anywhere. He is running up and down the pier all the time. I don't remember where I met him.

Q. Who was present? [189]

A. Just Charley and I.

Q. What was said?

A. Well, I told him that I understood that they had held a Directors' meeting after the stockholders' meeting was held. I wasn't present there, but I was told they authorized an attorney to sue Bill Harrah on the old Plaza Building lease.

Q. Did you explain to him what that suit was about?

A. Yes, I told him that they were claiming that they hadn't turned the bonds in properly or something like that, and that I didn't think there was any merit in the action at all but you never could tell within a hundred feet how a lawsuit was coming out and I thought it would be a good thing if Bill had an interest in some obligation of the company and it would probably avoid a suit if he just had it. So I asked him what he would take for the half interest he had left in that contract.

(Testimony of John Harrah)

Q. What did Mr. Brown say?

A. He said he would think it over and let me know about it.

Q. Then did you see him again?

A. Yes, I saw him.

Q. Where was that?

A. Well, I don't know where that was either.

Q. I beg your pardon?

A. I don't know where it was; around Venice somewhere. [190]

Q. Who was present?

A. Just Charley and I.

Q. And what was said at that time?

A. He said he would take \$3,000 for a half of what he had left. So I told him I would call Bill up and talk to him about it.

Q. And did you call Bill? A. I did.

Q. And what was the conclusion reached?

A. Bill said, "Go ahead and buy."

Q. Then did you proceed to buy an interest in the contract?

A. Yes, I gave Charley a check for \$3,000 on Bill Harrah's bank account, and he gave me an assignment—

Q. Who signed the check? A. I did.

Q. And on what account was that drawn?

A. The Bamboo Hut, Security-First National Bank of Venice.

Q. Now you stated that you were not present at the special Directors' meeting at which the suit against William Harrah was authorized?

A. No, I wasn't there; that is, they held a Directors' meeting and I heard afterwards that they authorized the

(Testimony of John Harrah)

suit. I wasn't present at that Directors' meeting. Subsequently it came up—oh, I don't know, a month or two later at a [191] meeting where I was present—and they wanted to sue William Harrah; and I voted, "Go ahead and sue him, get it out of your system."

Q. As a matter of fact, all the Directors voted yes except John Harrah, who voted no, isn't that correct?

A. What does that mean?

Q. This was the meeting of December 4th?

A. December 4th?

Q. That is correct, 1944.

A. I don't know about that one. The meeting that I was informed about took place, oh, about—I would say November 12th, within a day or two of that date. That is the one I heard about and the meeting where I—they suggested suing William Harrah and I voted yes was—oh, that was just two or three months ago. I don't know whether it was Lou Halper's office or down at the Kinney office.

Q. Let me get this straight, Mr. Harrah: At that time you referred to, when there was a Directors' meeting—was that before or after you purchased the contract?

A. Before Bill got the interest in it?

Q. Yes. A. That was before.

Q. All right, now, on what date was that.

A. I just stated, as near as I can remember it was about the 12th of November, because it was just long enough after the stockholders' meeting for them to give the notice, the [192] 48-hour notice required. I remember I got a notice of the meeting, but I didn't attend it.

(Testimony of John Harrah)

Q. Have you examined the minutes of the meeting?

A. No, I haven't seen any of the minutes since you have been the secretary.

Q. Well, now, if I should state that, as a matter of fact, the first time that the question of suit against William Harrah by the new Board of Directors was considered was on December 4, 1944, at which meeting you were present, would you say that was the fact?

A. No, that wasn't the way I heard it. The way I heard it it was the meeting you held just a few days after the stockholders' meeting of November 8th.

Q. Now at the stockholders' meeting of December 4, where this matter was considered, the following took place, is this not a fact.

"The question of bonds having been turned in by the officers of directors of the company or their relatives in discharge of rentals debts owed the company at a value much higher than the market value of the bonds and much higher than other debtors were permitted to turn the bonds into the company was then discussed. Upon motion duly made, seconded, and carried the following resolution was adopted:

Resolved that the law firm of Nicholas and Davis be instructed to forthwith institute an action on [193] behalf of the company against Carleton Kinney, William Harrah, and I, Edward Robbins, for balance due on rentals which were improperly settled by acceptance of bonds of the company above the value thereof. Harrah voted no, Halper declined to vote."

(Testimony of John Harrah)

Do you recall that taking place at that time?

A. No, I don't recall it, but I wouldn't deny that it took place. My memory isn't so good that I can remember everything that happened.

Q. Do you also recall that at that time "A lengthy general discussion was then had on the sprinkling system contract and the payment by the retiring officers of the company to Charles Brown of \$30,000 on the date the new Board of Directors was elected. John Harrah, on questioning of Morris Young, refused to give any reason for having made the payment other than that a demand had been made therefor and a threat to turn off the water by Charles Brown. He stated that he had other information but would not discuss it and that if the company wanted to bring a suit to go ahead and do it. The following resolution was then proposed and seconded: Resolved that Nicholas and Davis, and Charles Cradick be authorized and instructed to forthwith bring an action on behalf of the company against Charles Brown and others to have them declared holders of said sprinkling system contract as trustees for the company and to take such other and further [194] steps as are proper to recover for the company the moneys paid to Charles Brown. All of the directors voted yes excepting John Harrah, who voted no. The resolution was declared adopted."

Do you recall that taking place?

A. There was a discussion there. I don't know exactly what took place. Will you read the next minutes?

(Testimony of John Harrah)

Q. (Reading):

"Frank Williams stated that the withdrawal of the \$30,000 had practically depleted the company's funds and had seriously jeopardized its ability to properly function."

A. Does it say anything about the approval of the previous—

Q. Yes (Reading):

"The minutes of the meeting of December 4th were read by the secretary and were approved as read excepting that that portion of the minutes dealing with the employment of Nicholas and Davis to bring an action against William Harrah, I. E. Robbins, and Carleton Kinney was ordered corrected to comply with the type-written transcript of the resolution. John Harrah voted no on the motion to approve the minutes as corrected."

A. I remember there was something about the—the discussion of the minutes not being correct before. [195]

Q. You remember we had a long—we had a reporter in there at that time or secretary, and we took the discussion between you and Morrie Young, and that—

A. I don't know. I remember there was a reporter there at one meeting. That may have been the one. But I remember at this other meeting when the minutes were read there was something about them that wasn't correct, I felt, and I didn't vote to approve them. I don't remember all that discussion.

Q. But under any circumstances you do recall that you were opposed to bringing any action to recover this \$30,000 or any part of it from Charles Brown?

A. No, I wasn't opposed to bringing any action. But as I remember the discussion, it was that I said after they got the contract I thought they were entitled to the money.

(Testimony of John Harrah)

There wasn't any reason for suing somebody unless they had something to sue them about. Later on—I know at several meetings of the Board of Directors you haven't had your book with you and I don't know whether—but I remember distinctly it came up for discussion at a later meeting, and for some reason you got authority again to sue those parties. And I voted yes. I remember that distinctly. We all voted yes. I said, "Go ahead and sue and get it out of your system."

Q. I think that is about what was said "get it out of your system." Now, Mr. Harrah, after the discussion with Charles Brown, then you prepared—had an assignment [196] prepared from Charles Brown to William Harrah, did you, of an interest in that contract?

A. I think I prepared it. That is my recollection. I heard him testify somebody else did it. My recollection is I did it.

Q. Was that assignment then executed by Charley Brown in your presence?

A. Yes, my recollection is I prepared it and presented it to him and he read it and signed it and I handed him a check for \$3,000. And that was the 25th of November, when that was done.

Q. As I understand it, you purchased that for the purpose of defending against this action that was to be brought for bonds that you had turned in to pay off a debt of your daughter?

A. I didn't turn any bonds in. I didn't purchase the contract. My son purchased it, the interest in it. But he purchased it on my recommendation after I called him up. And that was the action he had in mind when he purchased it—

(Testimony of John Harrah)

Q. And the purpose—

A. To use as an offset in case they wanted to bring suit, just another defense.

Q. I see. Did Charley Brown have access to the safe of William Harrah in Venice?

Mr. Cobb: What time?

Mr. Davis: Q. Oh, from the time—let's say, during the [197] period of 1943 and 1944.

Mr. Kitzmiller: If you are talking about the Bamboo Hut, he seems to have said that he had access to it.

Mr. Davis: I have not questioned Mr. John Harrah about that.

The Referee: Go ahead.

The Witness: Will you state the question, please?

Mr. Davis: Q. Did Mr. Charley Brown have access to the safe which you maintained in your office in Venice during the year 1944?

A. No, I didn't maintain any safe at my office at Venice.

Q. Was there a safe which you and Mr. Brown had joint access to?

A. There was a safe which we both had access to.

Q. Where was that safe located?

A. That safe was in the back of the William Harrah liquor store in Venice.

Q. What moneys did you keep in that safe?

A. I kept in that safe principally receipts of the Bamboo Hut and the liquor store. The Bamboo Hut was a bar, and the liquor store was a retail store adjoining.

(Testimony of John Harrah)

Q. What moneys did Mr. Brown keep in that safe?

A. Didn't keep any money in it.

Q. Now when Mr. Brown wanted to go in there, he would just go in there and take out any moneys he wanted without first getting your consent to it? [198]

A. Well, it could have been done. He had instructions as to what he could do. What he could do was—he could cash checks that he thought were all right, and there are some things down there in that business that are all C. O. D., like Coca-Cola. They collect the money when they deliver it; and the Home Ice Company; they collect the money when they sell beer, they collect the money. And those other soft drink companies, like, oh, Dr. Pepper and some of the others; and glass, all sorts of glassware, the Reliable Glass Company. It is all C. O. D. business. So he was authorized to do those things, to accept those things that had to be paid for in cash; he was authorized to pay for them out of the cafe. First he was authorized to pay them out of the cash register. But later on the liquor store was closed on account of we couldn't get enough liquor to supply the liquor store and the bar both. So the store was closed—the front door was closed for further business, and it was used for storage for the bar. Then he was given access to the safe because there wasn't any receipts to speak of in the cash register. And he was authorized to accept those things and pay for them and put the receipts in the safe and to cash checks.

Q. You had a desk in the same room as the safe was in?

A. Yes, I was manager of the liquor store and the Bamboo Hut for my son. And that was all the office

(Testimony of John Harrah)

there was to it. It was a large room, as large as this perhaps. The safe was in there, and the desk was in there and the rest of it was [199] mostly filled up with cases, full and empty.

Q. How much money was kept in the safe on an average?

A. Oh, not much money; several hundred dollars, enough to cash several checks; five or six or seven or eight hundred dollars, around there.

Q. Was there ever as much as \$5,000 in there?

A. Oh, no.

Q. \$2500? A. No.

Q. Never \$2500? A. No.

Q. Never that much?

A. No, I have no recollection of there ever being that much cash in there.

Q. Were there securities kept in there?

A. No, all there was in there was the little books of account of the Bamboo Hut and the liquor store and a little money. I also had those—those Abbot Kinney Company certificates of deposit were in that safe. They were locked up in a separate little compartment to which I only had a key.

Q. I did not get that last statement?

A. Those certificates of deposit I held as treasurer of the company. They were in there, but they were locked up in a little iron box part to which I only had the key. And that is all there was. Of course when I would cash checks, [200] I would take the money out and leave the checks there.

Q. You had great confidence in Mr. Brown, I take it, from your testimony? A. Yes, he's honest.

(Testimony of John Harrah)

Q. And you felt that you could trust him in every detail so far as business was concerned?

A. I never had any question about Charley Brown's honesty in my life.

Q. Now has Mr. William Harrah received anything on account of his interest in the contract which he purchased? A. Sprinkler contract?

Q. Yes. A. No.

Q. To your knowledge had any money been paid on that sprinkling system contract from the date you became connected with the company up to and including the first payment to Charles Brown?

A. No, nothing had been paid on it.

Q. And you knew when the first payment was made that Eddie Gerety was the general manager of the company, did you not?

A. Well, I knew what he was of the company. I have heard discussion on it, about general manager and so forth. I knew what he was, and I knew what his duties were. I had known that for a long time.

Mr. Davis: I believe that is all, your Honor. [201]

The Referee: Q. Mr. Harrah, do you have any financial interest in the Kinney Company either as a stockholder, bondholder, or creditor?

A. No, I do not have.

Q. Have you ever had?

A. No—wait a minute, I have. I think I have five shares of stock.

Q. You have five shares of stock?

A. I paid five cents for it.

Q. I see. A. I got that a few months ago.

(Testimony of John Harrah)

Q. When did you acquire that?

A. Oh, a few months ago. I have carried that in my pocket ever since I had it. I don't remember the exact date I got it.

Q. Whom did you buy it from?

A. Eddie Gerety. One day he was showing it to me, had some certificates for it. And I said, "I will give you a nickel for it." And he handed it to me, and I gave him the nickel.

Q. Outside of that you have never had any financial interest in this company in any way; is that right?

A. That is right, never had.

Q. Are you entitled to any compensation for any services? A. As director?

Q. As director or member of the Executive Committee what [202] were you entitled to?

A. No, we recently voted the directors \$10 per meeting. Until recently there has been no compensation before.

Q. When you were active as a member of the Executive Committee, were you entitled to any compensation, Mr. Harrah?

A. Yes, that's right. I drew— (addressing Mr. Davis) Didn't we get \$25 a month?

Mr. Davis: I don't know, Mr. Harrah.

The Witness: The members of the Executive Committee got \$25 a month.

The Referee: Q. The members of the Executive Committee got \$25 a month? A. That's right.

Q. How often did you meet?

A. We met usually every week.

(Testimony of John Harrah)

Q. Once a week? A. Once a week, on Tuesday.

Q. All right, what did your office first consist of?

A. In the Kinney Company?

Q. Yes.

A. It consisted of Mr. Mapes, the bookkeeper and auditor; and a young lady—oh, I would say she is assistant bookkeeper and cashier; and Mr. Gerety, who was the manager. That was the regular office there.

Q. In other words, three people in the office?

A. Three people in the office. [203]

Q. Did you have a staff of workmen?

A. Oh, yes.

Q. How many people did you put on the payroll in that capacity?

A. Well, I would say an average of twenty.

Q. Twenty? A. About that.

Q. I see. This sprinkling system you talk about here, was that installed on the Venice Pier?

A. Yes, it covers all of the Kinney property west of the ocean front walk, the bath house, California Theater Building, the Plaza Building—the Plaza Building runs from the theater to the pier itself; and it covers a little wagon trail bar that's on the west side of the walk, and it covers every structure from there clear out to the edge of the pier, on both sides of the pier, and a large elevated water tank built right back of the Robbins Building. It didn't cover the building that burned down; that was on the other side.

(Testimony of John Harrah)

Q. I just noticed something here that confuses me. Bankrupt's Exhibit 2, the assignment to Charles J. Brown, reads in part:

"This assignment has been executed on March 4, 1944, but shall not be effective until the 13th day of June, 1944, which is the date of delivery hereof to the Executive Committee, executed in New York, [204] New York, on March 4, 1944, F. R. Cruickshank and Company, by H. S. West, by H. O. Dorr, Secretary."

Now the place where the "13" is written in apparently originally just had an underline, a blank space. The place of the assignment, the two places in the assignment, where the name Charles J. Brown is written, also apparently were originally just blanks with an underline drawn. My recollection of Mr. Brown's testimony was that these negotiations began in June.

Mr. Davis: That is correct.

Mr. Kitzmiller: That is correct.

Mr. Davis: That they began June 10th about, and that it was consummated June 13th, as I recall it.

The Referee: As he was concerned about an action's being taken on leases and so on and wanted to acquire—thought it would be advisable to acquire this—

Mr. Kitzmiller: Mr. Darling, who I understand was going to be subpoenaed by the others, most likely would be able to explain that. Evidently Mr. Davis talks about—or there was a conversation here about—an option in 1943 and various negotiations in 1944—Mr. Halper and so forth and so on. And most likely this was just a blank assignment—

The Referee: I see.

(Testimony of John Harrah)

Mr. Kitzmiller: —in March of 1944.

The Referee: All right.

Mr. Kitzmiller: At least that accounts for those names' [205] being in blank and the dates, where the—

The Referee: Q. Now, Mr. Harrah, you have spoken of Mr. West, who signed this assignment as the president of the Cruickshank Company, familiarly as "Red" West. Where does Red West reside?

A. I have always understood he lived in New York City. I was—he had told me that.

Q. How? A. He told me that.

Q. Does he have a residence in Southern California, do you know?

A. I don't think think so. I never heard of him having any.

Q. You never did?

A. No, I never.

Q. Where is Mr. Darling's office?

A. It is here in Los Angeles; I don't know where.

Q. That is, in Los Angeles?

A. Yes, he's located here.

Q. How frequently did Mr. West come to Southern California?

A. I don't know. I have recollections of never seeing him myself but twice; and that was a number of years ago, several years ago.

Q. He was not here a great deal that you know of?

A. Not that I know of, no.

Q. You spoke of his having gone to the races, I think, [206] and making some proposition to somebody?

A. Yes, to Frank Williams. That was one time he was here apparently. But I hadn't seen him.

(Testimony of John Harrah)

Q. Now calling your attention to Bankrupt's Exhibit 7, which is the letter from the Cruickshank Company from New York, do you recall ever seeing any other communication from the Cruickshank Company which was on the New York letterhead of the company?

A. I don't recall now ever seeing any communication from the Cruickshank Company on any letterhead other than that.

Q. Do you recall ever seeing any written notice or demand from the Cruickshank Company in connection with the sprinkler contract?

A. Not other than that I don't.

Q. That is the only one you remember seeing?

A. The only written thing I remember seeing, as far as I remember.

The Referee: Do you want to cross examine or call Mr. Harrah as your own witness?

Mr. Heap: Mr. Davis, I have that check and bill of sale you asked about yesterday, if you would like to see it.

Mr. Davis: Thank you. I assume for the purposes of the record we will have to introduce these unless—if you want these back, we could read this assignment into the record.

Mr. Heap: You might read it into the record, because I guess it is an original. [207]

Mr. Davis: Q. I call your attention, Mr. Harrah, to a check #6148, Bamboo Hut, signed by John Harrah, made payable to Charles J. Brown for \$3,000, and ask you if you have seen that check before?

A. Yes.

(Testimony of John Harrah)

Q. What does that check represent?

A. This is a check drawn on the Bamboo Hut account to pay Charles Brown for the assignment to John Harrah of a half interest in the—

The Referee: Bankrupt's Exhibit 8.

Mr. Davis: I would like to read into the record, if I may, the assignment—

The Referee: All right.

Mr. Davis: —in lieu of introducing it in evidence. The letterhead reads "John Harrah, Attorney at Law, Phone 63415, 23 Windward Avenue, Venice, California."

"November 25, 1944.

"In consideration of the sum of \$3000.00 receipt of which is hereby acknowledged, the undersigned, Chas. J. Brown, sells, assigns and transfers to Wm. Harrah, a one-third interest and share in the Cruickshank—Abbot Kinney Co., fire sprinkler system contract recorded in book 10877 page 246 of Official Records in the office of the County Recorder of Los Angeles County, and also the Supplemental agreements pertaining thereto, dated Dec. [208] 29th, 1937, and January 14th, 1943, and all rights thereunder including ownership subject to the conditional sale contract, of the Sprinkler system installed. As the result of this assignment, Wm. Harrah is the owner of a one-third interest, E. A. Gerety of a one-third interest, and Chas. J. Brown still retains a one-third interest. There is at the time of this assignment a balance of \$80,000.00 unpaid on the contract, all of which is now due from the Abbot Kinney Company.

(Signed) Charles J. Brown"

(Testimony of John Harrah)

Q. Now, Mr. Harrah, of your own knowledge is that the actual assignment executed?

A. That's it.

Q. That is the assignment by Mr. Brown to William Harrah? A. That's it.

Mr. Davis: Thank you.

(A short recess.)

The Referee: Do you wish to cross examine Mr. Harrah or call him as your witness?

Mr. Kitzmiller: I will examine Mr. Harrah.

Cross-Examination.

By Mr. Kitzmiller:

Q. Mr. Harrah, at the time of the payment of this \$7500 in June, 1944, were there any large creditors of the Abbot [209] Kinney Company except—

A. The only large creditors are current creditors. They paid all creditors on the 10th of the month.

Mr. Davis: Your Honor, I object to the question on the ground that it is incompetent, irrelevant, and immaterial so far as this particular proceeding is concerned. I think it goes to the question of the precise—that that is not involved in this particular phase of the investigation.

The Referee: How will it help you, counsel?

Mr. Kitzmiller: Merely this, that counsel—and this is merely cross examination—went into the question of the moneys on hand in June and November and the payment of \$30,000 at one time, \$7500 at another time; and I would like to know whether or not there was any outstanding obligation at those particular times other than this matter of the insurance company—not the insurance

(Testimony of John Harrah)

company, this personal injury judgment—that would show that there were no funds with which this \$30,000 could be paid or the \$30,000 was taken from some other legitimate expense and turned over to these people without this money, all of it, being in the company treasury, being really necessary for allocation to other purposes.

The Referee: Objection sustained. Proceed.

Mr. Cobb: Your Honor, on that I think we should make an offer of proof, that there were no other creditors—the \$15,000 that was mentioned as a judgment was later paid by [210] the insurance carrier. And there were no obligations other than current bills and that condition extended down to the payment of the \$30,000 in November.

Mr. Davis: We object to the offer of proof.

The Referee: You owed \$320,000 on the bond issue, did you not?

Mr. Davis: Substantially that and over \$100,000 in taxes.

The Referee: I think the whole thing is immaterial to this hearing. It will be material if we get to the hearing on the involuntary petition. But it is immaterial to the issues here.

Mr. Cobb: So far as the bond issue is concerned we can go into that—

The Referee: You see where we are going to lead to if we go into the question of the solvency or insolvency of this company in this hearing, or the present liabilities of the company. We are just going to extend this into the involuntary petition, and these matters have not been consolidated for hearing. It is entirely immaterial what the financial condition of the company was. It is ma-

(Testimony of John Harrah)

terial, I think, to know the cash resources of the company at the various times that are of importance here; but what the liabilities of the company were, that is immaterial.

Mr. Cobb: I want the record to be clear on my position. My position is this—

The Referee: You may make an offer of proof, Mr. Cobb. [211]

Mr. Cobb: The offer of proof will be that the bond issue which your Honor has mentioned was outlawed by the statute of limitations so far as any liability against the assets of this corporation; that there were no merchandise creditors or creditors other than for current obligations that had an enforceable claim against the assets of the corporation; that the taxes due were real estate taxes against the particular parcels of real property; that the obligation under the sprinkler contract and the obligation to the trustee on the bond indenture constituted the obligations of the company.

The Referee: Is there an objection?

Mr. Davis: Oh, yes, we object to it, your Honor, on the ground that it is incompetent, irrelevant, and immaterial, and has no bearing on the issues presented in this particular proceeding.

The Referee: The objection is sustained.

Mr. Heap: Let the record show the same objection on behalf of William Harrah, your Honor.

Mr. Kitzmiller: The same objection on behalf of Mr. Gerety with an additional offer to the effect that the assets—an offer to prove that the assets of the company were in no event, under any consideration, irrespective of any of the liabilities, equal to or capable of—or equal to the amount of the bond issue outstanding, irrespective

(Testimony of John Harrah)

of any question of interest on the bond issue; also a further offer that, as to these taxes spoken of, we would prove by this witness [212] that these taxes were not taxes on any of the operative property—

The Referee: Make your offer of proof, counsel. If you don't know what it is, don't ask some other attorney. Go ahead. Have you finished?

Mr. Kitzmiller: Yes.

The Referee: Is there any objection?

Mr. Davis: We object on the same grounds.

The Referee: Objection sustained. Is there any objection to the offer of proof on behalf of William Harrah?

Mr. Davis: We make the same objection, your Honor, to all offers of proof, as I said.

Mr. Cobb: I am not clear whether I made any offer from the period of June 23, I believe the date of the \$7500 payment, to the payment of the \$30,000 on November 8th. I want to be sure that those two periods and dates are covered in my offer.

The Referee: Very well. The objection is sustained. Is there any other cross examination?

Mr. Kitzmiller: Yes.

The Referee: Go ahead.

Mr. Kitzmiller: Q. You stated on your direct examination that you knew what Eddie Gerety's duties were when you became a director of the corporation. Will you state just what those duties were at that time?

Mr. Davis: Now, if your Honor please— [213]

The Referee: Let him finish his question.

Mr. Davis: I am sorry.

(Testimony of John Harrah)

Mr. Kitzmiller: Q. (Continuing) —and what, if any, changes there were in those duties as of a period, we will say, from May 1, 1944, to November 8th or 9th, 1944?

Mr. Davis: If your Honor please, I object on the ground that it has already been stipulated to that Eddie Gerety was the general manager; that it is therefore—that it carries with it all the legal implications; and that it is incompetent, irrelevant, and immaterial for that reason.

The Referee: Just a minute. You opened it, counsel. You asked the witness if he knew what the duties were.

Mr. Davis: I withdrew the question and it wasn't ever asked, your Honor. Remember the objection was made and the stipulation was referred to and I continued no further—

Mr. Kitzmiller: If the reporter will go back to 11:29—

The Referee: The objection is overruled.

Mr. Kitzmiller: Mr. Reporter, will you please read the question?

(The reporter read the following question: "You stated on your direct examination that you knew what Eddie Gerety's duties were when you became a director of the corporation. Will you state just what those duties were at that time and what, if any, changes there were in those duties as of a period, we will say, from May 1, 1944, to November 8th or 9th, 1944?") [214]

Mr. Davis: Might we—if we could refer back to that statement, your Honor—

The Referee: Counsel, let us not argue the rulings.

Mr. Davis: I did not mean to.

The Referee: Go ahead.

(Testimony of John Harrah)

The Witness: The question is, what his duties were at that time? Is that it? That is the way I understand it.

The Referee: Specify the time, counsel.

The Witness: His duties were to negotiate leases and to talk to the tenants and see that the rent was collected, and report—at that time the Board of Directors—there wasn't any Executive Committee; at that time it was the Board of Directors—make recommendations, requests; ask authority to execute leases, make any other contracts in reference to the company; pay taxes—that is, to ask for authority to pay taxes. He was authorized to look after the general up-keep of the property and to confer with all municipal, county, and state authorities on matters pertaining to the Abbot Kinney Company on health or safety matters and such as that. Those were his duties at that time.

The Referee: Q. What time do you mean?

A. When I was put on the Board of Directors December 23, 1937.

The Referee: Go ahead, please.

Mr. Kitzmiller: Q. When the Executive Committee was formed, which I understand was some time in 1940, what were [215] Eddie Gerety's duties after the Executive Committee was formed?

A. As far as duties, they continued to be the same except that he reported and conferred with the Executive Committee and requested them instead of the Board of Directors. Of course the Board of Directors, too, when they met; but they met very seldom. The Executive Committee was the one that held the meetings and con-

(Testimony of John Harrah)

ducted the affairs of the corporation and instructed Mr. Gerety what to do.

Q. Did he have any right, after the Executive Committee was formed, to enter into leases for and on behalf of the corporation?

A. No, he never had the right at the time I was on the Board of Directors unless he got that instruction by action of the Board in specific instances—the Board and, later, the Executive Committee.

Q. Did he have any right to enter into any contracts for and on behalf of the corporation without the specific authorization from the Executive Committee?

Mr. Davis: Just a moment. I object on the ground that it is too indefinite as to what he means by "any contracts."

The Referee: Sustained. Proceed.

Mr. Kitzmiller: I withdraw that.

Q. Well, in effect, Mr. Gerety was an office manager.

Mr. Davis: I object to that on the ground that it is indefinite as to "in effect."

The Referee: Sustained. [216]

Mr. Kitzmiller: Q. Do you of your own knowledge know whether or not the Articles of Incorporation of the company provide for a general manager of the Abbot Kinney Company?

Mr. Davis: I object to that on the ground that the Articles of Incorporation are the best evidence.

The Referee: Sustained.

Mr. Kitzmiller: Will you produce the Articles of Incorporation, counsel, and also the By-Laws as some hearing here?

(Testimony of John Harrah)

Mr. Davis: I will if I can find them. I can get the By-Laws.

Q. It was incorporated when, Mr. Harrah? You know that. It was back in 1906, was it not?

A. I don't know when. I didn't do it.

The Referee: Counsel, proceed with your cross examination.

Mr. Kitzmiller: Q. Now the year 1944? Was that a prosperous year in connection with the affairs of the Abbott Kinney Company?

A. It was the most prosperous year the company has had for ten or fifteen years at least, perhaps twenty.

The Referee: I think we had better take an adjournment at this time. The witnesses in the court will be instructed to return here at 2 o'clock p. m. without further notice. [217]

2:00 O'Clock, P. M., Session.

The Referee: All right, gentlemen, proceed.

Mr. Davis: With your Honor's permission and the permission of counsel I would like to call Mr. Hugh Darling out of order. Mr. Darling is due in San Francisco tomorrow and is due out of his office—

The Referee: Is there any objection?

(No answer.)

Mr. Davis: I talked to Mr. Cobb, and he indicated there would be no objection.

The Referee: I think we may proceed. Is there any objection to calling Mr. Darling out of order? All right, come forward, please, Mr. Darling.

HUGH DARLING,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: All right, be seated, please. Your name, sir?

The Witness: Hugh W. Darling.

The Referee: All right.

Direct Examination.

By Mr. Davis:

Q. What is your business or occupation, Mr. Darling? [218] A. Attorney.

Q. How long have you been practicing law?

A. Ever since 1928.

Q. Are you acquainted with H. S. West, of the F. R. Cruickshank Company? A. Yes.

Q. Do you represent the F. R. Cruickshank Company in any legal matters? A. Yes.

Q. Did you represent them in regard to a sprinkling system contract that was owned by the Abbot Kinney Company? A. Yes.

Q. Did you at any time serve on the Board of Directors of the Abbot Kinney Company?

A. I did.

Q. When did you go on the Board of the Abbot Kinney Company?

A. I would say it was sometime in 1938, and I remained on—perhaps two or three years.

Q. During that time did you attend any of the meetings of the Board? A. Yes.

Q. You attended most of the meetings, did you?

A. At the start. I would say for the first two years.

(Testimony of Hugh Darling)

Q. Now did you ever make a demand upon the Abbot Kinney Company for payment on the F. R. Cruickshank Company contract? [219]

A. Orally or in writing?

Q. Well, will you start out with orally?

A. I would question whether you would call it a formal demand. The subject was discussed on several occasions that I recall. In writing my recollection is that the demands emanated from the F. R. Cruickshank Company's office in New York.

Q. Do you know how many of those were sent out?

A. As I recall, they would send out a statement which was tantamount to a demand as each installment became due. Then there was one time when the Abbot Kinney Company was placed on formal written notice of a default, that under the contract I think it required a 30-day notice to place the contract in a position where action could be taken under it.

Q. Are you referring to a notice that was sent out this last year, November, 1944?

Mr. Kitzmiller: You mean June, 1944, do you not, counsel?

Mr. Davis: Yes. Pardon me, June, 1944.

The Witness: Yes.

Q. Now during the time you were on the Board of Directors that was not sent out? When that was sent out you were not a member of the Board of Directors of Abbot Kinney Company?

A. That is right.

Q. During the time you were a member of the Board of Directors of the Abbot Kinney Company, did you make

(Testimony of Hugh Darling)

demand for payment of moneys on account of the Cruickshank contract? [220]

A. I don't recall that anything I said could be construed as a formal demand; but my recollection is that either during the course of some of the meetings or in informal conversation with other directors or with officers that I posed the question about when some payment would be forthcoming or words to that effect.

Q. And what was stated to you by the directors at that time, at the times you were at the Directors' meetings? A. I don't recall any statement—

Q. Did you ever receive any payment on account as a result of these demands? A. No.

Q. Did you receive any money on account regardless of the demands?

A. On account of the contract?

Q. On account of the contract.

A. Not that I recall, no.

Q. Do you recall the amount due on the contract at the time you first represented the Cruickshank Company?

A. With accrued interest, I think it was around \$157,000. That is my recollection.

Q. And as of what date was that, Mr. Darling?

A. Well, that was at the time a supplemental agreement was executed and which I think was in the latter part of 1938.

Q. I call your attention, Mr. Darling, to a copy of the supplemental agreement dated the 29th day of December, [221] 1937, and ask you if that is the agreement you refer to?

A. Yes, that is the one. I was wrong on that date.

(Testimony of Hugh Darling)

Q. And at that time you agreed to waive the interest, as I recall— A. That was it.

Q. —and take the amount for the principal balance due. And what was that amount?

A. According to this contract, \$137,000 owed.

Q. And was any money ever paid on that \$137,000 during the time you represented the Cruickshank Company and prior to the actual assignment of it to Charles Brown, et al? A. Not to my knowledge.

Q. Are you acquainted with M. Philip Davis—

A. Yes.

Q. —that is, myself? A. Yes.

Q. Did you have a discussion with M. Philip Davis relative to the purchase of this contract in the early part of 1943; January, 1943?

A. The dates are not clear in my mind, but that sounds reasonable. I did have a discussion, and that date seems reasonable.

Q. And who was present at that discussion and what was said?

A. I don't recall any one being present although there may have been. [222]

Q. Other than yourself and M. Philip Davis?

A. That's right.

Q. What was said at that time about the sale of the Cruickshank contract— A. The what?

Q. To M. Philip Davis?

A. My recollection on that is very hazy. But as nearly as I recall it, the question was raised as to whether or not Red West, as he was called, would be interested in selling the contract; and I think I said he might be or I would check into it and I believe it was at that time that

(Testimony of Hugh Darling)

I followed it through with Mr. West. And then the discussion was revived and I think the figure finally got down to \$10,000 at that time.

Q. You definitely offered it at that time for \$10,000 to M. Philip Davis?

A. I think that was the time—if it was 1943. Mr. West was out here; and he said, "Go ahead and offer it for \$10,000." I made the firm offer of \$10,000. I think it was the next day he called up and said "Put a deadline on it," which I did on the telephone. And I believe it was 12 o'clock noon two or three days subsequent to the date that I talked to you on the telephone that unless the cashier's check were in my office at that time the offer would be withdrawn and it was withdrawn.

Q. Then after that conversation in 1943 did you have a [223] subsequent conversation with Mr. Philip Davis in Washington, D. C.?

A. I had a conversation with you in Washington, D. C.; but I would be reluctant to attempt to fix the date.

Q. It was subsequent to that time, though?

A. Yes.

Q. And do you recall, Mr. Darling, if it was in the early spring of 1944?

A. It may have been; however, before that there was another conversation with you—or perhaps it was your brother, Tom Davis—at which time a different proposal was made. There were two alternate proposals that contemplated the joining of hands of the so-called Davis group and this West contract. I think that intervened between the conversation I had with you in Washington.

(Testimony of Hugh Darling)

Q. Now do you recall where that conversation took place in Washington?

A. I would say at the Statler Hotel in the lobby.

Q. To the best of your recollection would you state what was said at that time regarding the F. R. Cruickshank contract?

A. I think you put the question to me as to whether or not that offer could be revived, referring, I assume, to the previous \$10,000 offer. I said I contemplated seeing Mr. West in New York within the next two or three days and I would discuss it with him and communicate with you when I got [224] back to the office.

Q. Did you have a conference with Mr. West regarding the same? A. Yes.

Q. Subsequent to that date did you have a conference with Mr. Davis in which you conveyed to him the results of this conference with Mr. West?

A. I believe I did.

Q. What did you tell M. Philip Davis at that time?

A. I think, as I recall, I stated that Mr. West was not at all enthusiastic about it; but inasmuch as his interests had been transferred and he did not anticipate spending any time out here, that he would probably be willing to go through with it but that he was not interested in any more talk. I think he used that wording, "I would like to see some money rather than just talk."

Q. Was there any further statement made by Mr. Davis regarding the right of refusal or anything to that effect?

A. Yes, I think you requested first that I disclose to you in the event any one else should approach me for a

(Testimony of Hugh Darling)

negotiation looking towards the purchase or acquisition of the contract. And I don't recall your words, but it was in effect that you would like to have a chance to meet or beat whatever price might be offered. As I recall, I stated that, in so far as I was able, I would advise you before I made a deal and if possible give you a chance to talk. [225]

Q. That was how long before the first conference you had with Mr. Eddie Gerety and Charles Brown?

A. I would say probably five or six months.

Q. Now just before you had your conference with Mr. Brown, did you call Mr. Davis on the telephone regarding—

A. No, I don't recall—as I reframe it in my mind, and I must confess that it is all quite hazy, it was around the first of the year, perhaps in January of 1944, that I saw you at the University Club and made that statement to you, relating what Mr. West had stated to me in New York.

Q. If I should refresh your recollection, Mr. Darling, if I may, that I was in New York on the 30th of May, 1944—that was the only time I was in New York during that—early 1944—would that help set the date any better for you?

The Referee: New York or Washington?

Mr. Davis: In Washington. I am sorry. In Washington, yes.

The Witness: I think that would tend to confuse me. My recollection is that it was around the first of the year of 1944 that I made that statement to you. Whether that followed or preceded our discussion in Washington I am not prepared to say.

(Testimony of Hugh Darling)

Q. As a matter of fact, you and I had many conversations at the University Club regarding it, did we not?

A. That's right.

Q. Now just when did you contact Mr. Davis, if you did, [226] regarding the possible sale of the contract to a third party? A. Well, now—

Q. Having particular reference to the final sale to Gerety and Brown?

A. Well, as I reconstruct it, some time in March or thereabouts that Mr. Medigovich, who represented a Mr. Phillips came over to my office and we had several conferences; and my recollection—I may be entirely wrong—is that it was that pending deal which prompted me to advise you that after a certain date I would consider myself released from my statement to you that I would advise you of any deal that was pending. That was not consummated. And I know that about that time I was back East again; and it was in June, as I recall—it was shortly after I had returned from the East—I received or there was a call waiting for me from Mr. Halper.

The Referee: I beg your pardon?

A. Mr. Halper, H-a-l-p-e-r. And he opened or invited negotiations. And I told him that West would be interested, but I quoted him a figure of \$50,000. As I recall, he came up to a firm offer of \$12,500, which I rejected. Then he called one time—it was about that time that Mr. Gerety called me; so this was around May or June. And he came in and discussed the subject, and I gave him the figure of \$15,000. And it was after that Mr. Halper called again and asked me if any one else had approached me. I said yes. Who? [227] I said I thought it would not be appropriate for me to disclose

(Testimony of Hugh Darling)

that. He says, "I assume it is Eddie Gerety; and if you lie, it is all right."

I don't know whether I admitted or denied it. But I heard nothing more from him. I do not recall that was the incident when I called you; it may have been. I think I had only one conference with Mr. Gerety in the office. I believe he offered \$10,000 if I am correct. And I told him the price was \$15,000. I think he called up the next day or a day or so after and said he could go to \$12,500. I told him that would not be acceptable because, as a matter of fact, Mr. West wasn't particularly interested anyway and I wasn't either. And it was then, perhaps another day or two or maybe the next day, that he called and said, "All right, \$15,000."

Mr. Davis: Q. Did you have any conference with him and Mr. Charles Brown prior to the actual consummation of the deal?

A. I don't recall whether I did have. I may have, but I do not recall it.

Q. Now, going back to this telephone conversation with M. Philip Davis, if you were meeting with Mr. Davis in Washington was in May, about May 30th or 31st, of 1944, your testimony, as I understand it, is that it was after that conference in Washington that you advised M. Philip Davis that Mr. West would take the \$10,000 and Mr. Davis said, "Now if I don't [228] accept it, will you give me the first right of meeting a subsequent offer?"

Mr. Kitzmiller: Just a moment. I object to that on the ground that it is leading and suggestive. There has been no testimony here that in May—

(Testimony of Hugh Darling)

The Referee: Sustained.

Mr. Davis: Q. State whether or not, Mr. Darling, the telephone conversation you had with M. Philip Davis was after your conference with M. Philip Davis in Washington, D. C., at the Statler Hotel?

A. I couldn't state that, Mr. Davis, with any certainty. This whole program is confused in my mind. It may have been. Now in going back over this, while testifying from the stand, my impression is that that occurred during the forepart of the year 1944 and preceding the negotiations I had with Mr. Medigovich. It may have been subsequent.

Q. Do you recall that W. Thomas Davis was also in Washington, D. C., at that time?

A. I hadn't; but if you say he was—yes, I believe I saw him at the time, yes. I have seen him there on two or three occasions.

Q. All right, now then, Mr. Gerety was the one that approached you so far as purchasing the contract?

A. Well, he—yes, he called me on the phone and then came into the office.

Q. Then you had a conference with Mr. Gerety and Mr. Brown? [229] A. That's right.

Q. And where was that conference?

A. That was in my office.

Q. And about what date was that?

A. As I recall, it was in June some time.

Q. And what was said?

A. I have no recollection of that. We were discussing the contract, and I made it clear that the assignment or whatever arrangement was made would be without any warranty.

(Testimony of Hugh Darling)

Q. And did they have the money with them at that time? A. I believe they did, yes.

Q. And you then prepared the assignment yourself, did you?

A. No, I had an assignment that had been executed in New York with blanks for the name of the assignee and a blank for the effective dates. And I had written authorization to fill those blanks in and receive telegraphic instructions for authorization before I prepared the final form. That's as I recall it.

Q. And the money was then paid to you in what manner? A. Cashier's checks.

Q. Do you remember how many cashier's checks there were?

A. No, I don't. There was more than one.

Q. Do you know who Eddie Gerety is in relation to the Abbot Kinney Company? A. Now, no. [230]

Q. Who was he at the time you were a member of the Board of Directors?

A. As I recall, he wasn't an officer or director. I think he was the manager.

Q. Mr. West lives in New York, does he not?

A. Yes.

Q. And you represented him in this matter entirely?

A. That's right.

If I may, your Honor, I would like to have this record show that I was on the Board of Directors of the Abbot Kinney Company as the nominee of Mr. West under an agreement whereby he had the right to nominate one director if he saw fit.

The Referee: Very well. The record will so show. Go ahead.

(Testimony of Hugh Darling)

Mr. Davis: I think that is all.

The Referee: Do you wish to cross examine, Mr. Cobb?

Mr. Cobb: Yes, your Honor, thank you.

Cross-Examination.

By Mr. Cobb:

Q. What was the proposed deal with Mr. Medigovich?

A. Several were discussed; none was crystallized.

Q. What was the last one that was discussed?

A. Well, there was under discussion an arrangement whereby Mr. Phillips, who was represented by Mr. Medigovich, would acquire a half interest in the contract with control of action [231] that would be taken under it. He was to assume the expense and liability of litigation if that appeared appropriate.

Q. Who is Mr. Phillips?

A. Well, I understood that he operated the dance down on the pier.

Q. Now there was another deal whereby the Davis group wanted to join with Mr. West—

A. Yes.

Q. —and acquire this? A. Yes.

Q. And what was that proposed deal?

A. That was, as I recall, in '43. It was a proposal that the Cruickshank Company would be placed in the so-called pool with the Davis interest in the bond pool. And the proceeds resulting from that combination were to be shared on a basis that was suggested. My recollection is that Mr. West was supposed to get the first \$25,000 that resulted from the combined pool, so to speak; and then the next \$50,000, I think, went to the Davis group.

(Testimony of Hugh Darling)

Then after that Mr. West was to get another \$50,000. There were two or three alternate plans suggested.

Q. Did that plan call for the payment by the corporation of the sprinkling contract?

A. Well, the plan did not cover that subject, but the contract was to remain alive. I assumed it was.

Q. And the \$25,000 that you had in mind to receive for [232] Mr. West would be paid by the corporation?

A. Not necessarily, because it contemplated a consolidation of the Davis interest in the bond pool with the Cruickshank contract.

Q. But the corporation would pay off the bonds and the sprinkler contract, and then you would divide those proceeds between the two groups?

A. I presume eventually or necessarily the money would have come from the corporation.

Q. When you refer to the "Davis group," to whom do you refer?

A. That is M. Philip Davis and his brother Tom Davis, I think, and the father Moses C. Davis, and Al. Newton. This was back in 1938 when the contract was entered into, and they referred to it as the "Davis group" before—

Mr. Davis: Q. As a matter of fact, it was referred to as the "Newton group," was it not?

A. Maybe so.

Mr. Cobb: Q. As a matter of fact, Mr. Davis has always been tied up with the Newton group, has he not?

A. So I understood.

Q. You gave Mr. Davis an option at one time, did you not? A. An option?

(Testimony of Hugh Darling)

Q. Yes, to buy this contract?

A. Not that I recall, certainly not a written option.

Q. Well, in the discussion you had with him in 1943 in [233] reference to \$10,000 did you understand that he personally or the Davis group was to acquire this sprinkler contract?

Mr. Davis: Just a moment, your Honor. I object to that. It is calling for the conclusion of the witness.

Mr. Cobb: This is cross examination.

The Referee: Overruled. Let him answer.

The Witness: Well, I will put it this way: I did not understand the corporation was going to buy. Now Mr. Davis in discussing it with me said—referred to his associates. Now I didn't go behind that.

Mr. Cobb: Q. He left the impression with you that the corporation was not buying it for that figure?

A. That is the impression I had.

Mr. Cobb: That is all.

The Referee: Is there any other cross examination?

Mr. Kitzmiller: I would like to question the witness, your Honor.

Cross-Examination.

By Mr. Kitzmiller:

Q. Mr. Darling, did you ever receive anything in writing for and on behalf of the Cruickshank Company from the Abbot Kinney Company during that period of time that you were director to the effect that the Abbot Kinney Company would pay you moneys on that contract,

(Testimony of Hugh Darling)

or the Cruickshank contract, moneys on that contract as and when they had moneys available? [234]

A. I don't recall that. Do you refer to the supplemental agreement?

Q. Yes.

A. Well, that supplemental agreement was executed in 1937, and that called for specific payments annually.

Q. Do you know whether the Cruickshank Company ever received any letters subsequent to that supplemental agreement stating that moneys were not available and payments could not be made at the time the letters were written? A. I don't recall any.

Q. Now, going to 1944, you stated that a Mr. Halper offered, you say, the sum of \$12,500, I believe was your testimony, for the—

A. I think his first offer was \$10,000 and I told him we would not accept less than \$15,000 and he went up to a firm offer of \$12,500.

Q. Did you at any time during the period of April to June, 1944, offer to the Davis group or any representative of theirs this contract for any sum under \$15,000—that is 1944?

A. Well, I don't—I don't recall that there was an offer under \$15,000.

Q. Do you recall whether or not you told them that they could have it in May or June—particularly in May, 1944, when you had this conversation back in the Statler Hotel in Washington—that they could have the contract for \$10,000? [235]

A. There was no firm offer at that time. I think it was—the statement was that I would discuss with Mr.

(Testimony of Hugh Darling)

West the matter when I saw him in New York. Mr. Davis asked me, as I recall, whether that offer could be revived at \$10,000.

Mr. Kitzmiller: Mr. Davis, have you the original of the agreement referred to by Mr. Darling; that is, the agreement between Harold Robbins and the Davis group in which the figures with regard to paying the Cruickshank contract off—

Mr. Davis: The agreement of December 23, 1937?

Mr. Kitzmiller: That is it.

Mr. Davis: No, I don't.

Mr. Kitzmiller: Well, I have a copy here. I wonder—

Mr. Davis: As far as I can tell, this looks like a copy of it. I have not had a chance to go over it, but it seems to be a copy of it. Yes, I believe that is, Mr. Kitzmiller.

Mr. Kitzmiller: Q. You were speaking, Mr. Darling, about an agreement whereby there were certain payments to be made to the Cruickshank Company and then so much to the Davis group and then so much to the Cruickshank Company if you did join in on this bond pool. I show you an agreement here and ask you if you—

A. Yes, I am familiar with this agreement, and this appears to be a copy of the so-called bond pool agreement.

Q. And was that the agreement that was discussed with you whereby any moneys received from the sale of bonds were to be paid, first, a certain sum to Mr. West and then some to the [236] so-called Williams group and to the Davis group and then a further sum to Mr. West, as you mentioned in your testimony a while ago?

A. That was, as I recall, in 1943. I think it was Mr. Tom Davis who first discussed with me—it may have

(Testimony of Hugh Darling)

been Mr. Phil Davis, however—about consolidating the Cruickshank Company with the Newton interest in this agreement dated December 23, 1937. Under the plan—I think there were two or three proposals submitted, whereby West would receive the first \$25,000 that came out of either the sprinkler contract or the Newton interest on this agreement of December 23, 1937. Then the next money would go to the Newton group, and thereafter as specified to West.

Q. And you were shown this agreement here?

A. I had a copy of that in my files at the time it was executed, because Mr. West is interested in that agreement.

Q. And Mr. West and the Cruickshank Company were, for all purposes here, one and the same? Mr. West had the contract and then it was transferred over to the Cruickshank Company? When we mention the Cruickshank Company, we are speaking of Mr. West, are we not?

A. Yes, at the time this transaction occurred, because he either owned outright or completely controlled F. R. Cruickshank Company.

Mr. Kitzmiller: I would like to offer this, if there is no objection to its not being an original. [237]

The Referee: Whom do you represent, Mr. Kitzmiller?

Mr. Kitzmiller: Mr. Gerety.

The Referee: Gerety's Exhibit No. 1.

Mr. Kitzmiller: Q. You say your discussions with Mr. Gerety were in June, 1944?

A. That is my recollection.

(Testimony of Hugh Darling)

Q. I show you a letter, being Petitioner's Exhibit 7, dated June 6, 1944, from the F. R. Cruickshank Company, New York, signed by H. V. Dorr, secretary and treasurer, and ask you if you know who H. V. Dorr was?

A. H. V. Dorr was secretary and treasurer of Cruickshank Company.

Q. Do you know whether or not H. V. Dorr was a resident of California or New York?

A. Yes, I do know.

Q. And what was he? A. New York.

Q. And do you know whether or not he was in California on the 6th of June, 1944?

A. I know that he was not.

Q. Do you know whether or not this letter was sent to the Abbot Kinney Company at the instance and request of Mr. Gerety?

A. I know that it was not.

Q. Do you know whether or not it was sent at the instance and request of Mr. Brown? [238]

A. Yes, I know it was not. It was sent at my instance and request.

Q. And not as the result of any conversation that you had with Mr. Brown or Mr. Gerety?

A. No.

Q. In 1944—I am not sure whether Mr. Cobb asked you this question—or from 1943 down to the date of the sale of the contract did any one approach you on behalf of the Abbot Kinney Company to purchase this Cruickshank contract for the Abbot Kinney Company?

A. No, to my knowledge no one ever approached me on behalf of the company so far as I knew.

(Testimony of Hugh Darling)

Q. Do you know whether or not Mr. West still has the right to appoint a director on the Board of Directors? You stated that you were a director pursuant to some agreement whereby he had the right to make such an appointment?

A. My recollection was that that was a provision included in that contract dated December 23, 1937. It may, however, have been by virtue of a supplemental letter; but it was at that time that the agreement was made that he did have the right to nominate a director.

Q. Do you know whether he still has that right or not?

A. I would say that the right—

Mr. Davis: I will object to that.

Mr. Kitzmiller: I withdraw the question. I have no further questions. [239]

The Referee: Is there any other cross-examination?

Mr. Davis: I have some questions, your Honor please.

The Referee: Proceed.

Redirect Examination.

By Mr. Davis:

Q. Mr. Darling, the conference that you had regarding the possible merger of the so-called Newton group and the F. R. Cruickshank Company took place prior to the offer of sale of the contract for \$10,000; is that not a fact?

A. That took place, as I recall, around the middle of 1943. I think that that \$10,000 figure was discussed or offered both prior and subsequent to that.

Q. Well, is it not a fact that at the time the Davis—the Newton—group was discussing the matter with you

(Testimony of Hugh Darling)

of a possible merger the lowest figure you had ever offered up to that time was around \$60,000?

A. No, I don't recall that figure.

Q. Do you recall a conversation had out at your home at which were present W. Thomas Davis and M. Philip Davis in 1942? I think that was the date you refer to, is it not?

A. I think that preceded that time by a fairly substantial period.

Q. But the merger that we were talking about was at all times before you had indicated you would take the small figure of \$10,000 for that contract? [240]

A. It may have been, but my recollection was that it was—the first time that that \$10,000 figure was discussed was in the early part of 1943. I may be wrong again on that. That was my recollection, but that so-called merger did not contemplate the payment of any cash. It was on the if, as, and when basis.

Mr. Davis: I believe that is all.

Mr. Cobb: That is all.

The Referee: Are there any other questions?

(No answer.)

Q. Mr. Darling, the letter which has been called to your attention and which is Bankrupt's Exhibit 7, was that mailed from your office, if you know, or from the New York office of the company?

A. That was mailed from the New York office. I prepared the form and mailed it back to the New York office. And I suggested that—as I recall, at that time there was some—it was preceding that that I sent it back to New York—there was some discussion about the possibility of a sale of property that had come up. And

(Testimony of Hugh Darling)

I sent that back with the suggestion that the letter be transcribed on Cruickshank's letterhead and sent out in order to place the contract in formal default where action could be taken by means of an attachment or otherwise it appeared appropriate, because under the orginal contract it required, as I recall, a 30-day notice before action could be taken. [241]

Q. You made some reference to a sale of property. I didn't quite get what you said.

A. Well, at the outset of this deal, if that is the right term, back in 1937, it was then expected that the County or the State was going to acquire the beach property.

Q. Yes.

A. And it was expected that the proceeds would be ample to discharge the bonds or release them and still keep the company active.

Q. I see.

A. And that was the foundation for the agreement by Cruickshank Company to forego the interest and ride with the plan.

Q. I see. Now do you know when this letter was actually mailed? It is dated June 6, 1944.

A. I would say it was mailed on the date it bears. I prepared the form. Some minor changes were made in the form I prepared. I sent it back to New York, and it preceded that date.

Q. Do you have any information as to whether it was mailed by regular mail or air mail?

A. No, except I received a copy presumably at the same time, a copy that was mailed at the same time.

(Testimony of Hugh Darling)

Q. Do you have a system of marking your incoming mail as to the time of its arrival?

A. We did not then, no. [242]

Q. In other words, an examination of this copy now would not disclose the date when the copy reached your office? A. No.

Q. Then—

A. I do know that it has always been the practice of Mr. West and his office to send anything out to the Coast by air mail. I don't believe I ever received a letter that was not sent air mail.

Q. Do you know of your own knowledge, Mr. Darling, why no formal notice of default was ever given under this Cruickshank contract before the letter which is Bankrupt's 7 was sent?

A. Because it was anticipated that payment of the contract would result from a sale of the property. And there appeared to be no reason for taking action—in other words, I thought—I will take the blame for that—that if an action was filed under the Cruickshank contract, involving in round figures \$150,000, that that would result in one of two things, either precipitate bankruptcy or force a foreclosure of the bonds. And this contract, while it was recorded—that is, the Cruickshank Company contract—and as such constituted a lien on the property, it was junior to the bond issue. And the bond issue, with accrued interest, involved of course a great deal of money. So it appeared to me, at least, that any formal action under the contract would have defeated the purpose of it, because it would have forced [243] either bankruptcy or foreclosure of the bonds.

(Testimony of Hugh Darling)

Q. You said that in your conversation with Mr. Brown and Mr. Gerety you pointed out that the assignment was without warranty? A. That's right.

Q. And in this part of your testimony I think you made some reference to litigation. You said of course they took it subject to any litigation or anything that might arise. I am not trying to quote your exact language. Do you recall that—

A. I don't recall any conference about litigation. But I tried to make the danger clear that a sale to Mr. Gerety or to Mr. Brown, whatever the case may be, was just—

Q. "As is"?

A. Yes, "As is" and "Let the buyer beware".

Q. But did you elaborate at all as to any litigation that might arise if they attempted to enforce the contract?

A. No, I don't recall that that was discussed.

Q. Did you—

A. I think I mentioned in connection with my negotiations with Mr. Medigovich that litigation was disucced, and that if Phillips took it over he would bear the burden of litigating it, the expense and the burden.

Q. Did you elaborate there as to what you meant by "litigation"?

A. No, because he was the one who said that he thought [244] that action or a threat of action *might productive* of some benefit. So that was the essence of it.

The Referee: All right. Are there any other questions, gentlemen?

Mr. Kitzmiller: Yes, your Honor.

The Referee: Go ahead, Mr. Kitzmiller.

(Testimony of Hugh Darling)

Recross Examination

By Mr. Kitzmiller:

Q. You spoke of your believing that there would be a sale to the County or the State and that that was the reason why you did not press the enforcement of this contract prior to 1944; is that correct?

A. Well, back up. This agreement that was entered into in December, 1937; that is, December 23rd, the so-called bond pool agreement, was bottomed on the understanding expectation that there would be a sale to the State or the County of beach frontage for the purpose of preserving the beach, and that the proceeds would be sufficient to reduce or discharge the bond issue.

Q. And in 1934 about the time, or immediately prior to the time, that you wrote this letter, did you then become convinced that it looked as if there would be no present sale to the State or County of that beach frontage?

A. You are talking about that letter of June 6, 1944?

Q. June 6th, yes. [245]

A. No, on the contrary, it was about that time, or shortly preceding that time that there was some rumor, probably not much more than that, about the County's acquiring some of the beach frontage down there. And it was my suggestion that that letter be addressed to the company in order to place the contract in default so we could file an action and attachment in the event that would be necessary.

Q. And that was the sole purpose behind that letter?

A. That is as I recall it, yes.

(Testimony of Hugh Darling)

Q. Do you know whether or not these letters that left New York to the Abbot Kinney Company, any of these letters, went by registered mail?

A. I have no idea at all.

Q. Do you know whether or not you advised them to send these letters by registered mail?

A. I don't recall it.

Q. Did—that is all.

The Referee: Q. Let me ask you this, Mr. Darling, if you can remember—do you remember which happened first, the receipt by your office of a copy of the letter which is Bankrupt's Exhibit 7 or the assignment to Mr. Brown of the contract?

A. May I have that question?

The Referee: Mr. Reporter, please read the question to the witness.

(The reporter read the question.) [246]

The Witness: Well, my best recollection is that I received the copy before I heard from Mr. Gerety at all. I may be in error. I know this, that I discussed the subject of such a letter with Mr. West in New York and I told him when I got back I would prepare the form and send it to him.

Q. Do you recall whether you mentioned either the letter or the subject matter of the letter either to Mr. Brown or to Mr. Gerety?

A. I don't recall that I did.

Q. Perhaps this may refresh your recollection: Here is a copy of the agreement, of the assignment to Mr.

(Testimony of Hugh Darling)

Brown. You may examine the dates on that and see if that will refresh your recollection as to whether you had received a copy of the letter which is Bankrupt's Exhibit 7 at the time you delivered that agreement of assignment to Mr. Brown.

A. I would say that I had received a copy of it. In any event it is certain in my mind that the form I prepared and mailed back to New York is substantially the same form as this letter, Exhibit 7.

Q. Yes.

A. And that preceded my conference with Mr. Gerety.

The Referee: I see. Now are there any other questions? May Mr. Darling be excused?

Mr. Kitzmiller: Just one question, your Honor.

Q. From the first time you heard from Mr. Gerety in June, 1944, up to the date that the contract was assigned to [247] Mr. Brown, approximately how many days elapsed—if you recall?

A. It was a short period. I would say certainly not to exceed two weeks; and my guess would be perhaps a week.

Q. About a week?

A. Yes, it is possible that he contacted me before I went East. I would be somewhat reluctant to say, but I know when it got down to negotiating, it only consumed a matter of a very few days.

The Referee: Is there anything else, gentlemen?

Mr. Davis: Yes, your Honor.

(Testimony of Hugh Darling)

Redirect Examination

By Mr. Davis:

Q. You refer to when you went East. When were you East at this particular time you are talking about, Mr. Darling?

A. I know I was East in—well, I had made, as I recall, four trips between the first of January and the last of June. I know I was in the East in March.

The Referee: Q. Do you remember Decoration Day, Mr. Darling? A. No, I don't recall that.

The Referee: Very well.

Mr. Davis: Q. Do you recall that you were in the East in May?

A. That's—yes, because, as a matter of fact, I was in [248] Washington on the first day of June. I know that.

Mr. Davis: That is right. Thank you very much.

The Referee: Is there anything else? May Mr. Darling be excused?

Mr. Davis: Yes, he may be excused.

The Referee: Thank you, Mr. Darling.

Mr. Pool: May I interrupt the Court?

The Referee: Yes.

Mr. Pool: I have to be in a Superior Court matter in Long Beach. Do you want to call me out of order? I have a Superior Court matter in Long Beach starting tomorrow—

The Referee: May Mr. Pool be excused?

Mr. Kitzmiller: Yes, your Honor.

The Referee: All right, come forward, Mr. Harrah. Mr. Harrah has been sworn.

JOHN HARRAH,

recalled for further

Cross-Examination

By Mr. Kitzmiller:

Q. Mr. Harrah, do you know whether or not Mr. Gerety could issue obligations for and on behalf of the corporation? A. No, he couldn't.

Mr. Davis: Just a moment, your Honor. I am sorry. I move that the answer be stricken for the purposes of an objection if I may [249]

The Referee: All right, it may go out.

Mr. Davis: I object on the ground that it is indefinite as to "obligations," and that it is incompetent, irrelevant, and immaterial; also that it calls for the conclusion of the witness.

The Referee: It is sustained. Gentlemen, it is always hard to prove things negatively. It would be much better to ask this witness if he knows what authority Mr. Gerety had.

Mr. Kitzmiller: All right, what authority did Mr. Gerety have?

Mr. Davis: Well, I object—

The Referee: Let us try to limit it a little bit. Suppose I ask the witness, with your permission, counsel:

Q. What authority, so far as you know, if any, did Mr. Gerety have to incur obligations on behalf of the corporation?

A. Well, he didn't have any unless you would call leases an obligation. He only had authority to—he occasionally was authorized to sign a lease by action of the Executive Committee.

(Testimony of John Harrah)

Q. Did he have authority to employ anybody?

A. He had authority to employ general workmen down there.

Q. Did he have authority to fix their wages when he employed them? A. No.

Q. I beg your pardon? A. No, he didn't. [250]

Q. In other words, he was authorized to employ at certain stated rates of pay; is that right? Is that what you mean?

A. He didn't have any authority. He would come in with—saying what he wanted to do, and he would get authority to do it. That is the way it was in employing people—except perhaps that—I would say that the—no, he didn't have any authority to do it. I don't know whether he ever did it or not, but he didn't have any authority to do it.

Q. When it was necessary to put somebody on the payroll, what was the procedure?

A. He would talk to the Executive Committee about it.

Q. Did he say, "I want to hire John Jones for so much money"? A. Yes.

Q. Or did he just ask for permission to hire somebody of his selection?

A. No, it was usually—especially if it was the head of a department, it was always submitted who he wanted to hire and what he wanted to pay them.

Q. If it wasn't the head of a department, did he have to tell you whom he was going to hire?

A. No, I don't think—I don't think it was the general practice to tell everybody he was going to hire, like a carpenter or somebody working under a foreman.

(Testimony of John Harrah)

Q. If he wanted to hire a carpenter, all he needed was authority to hire a carpenter, is that right? [251]

A. Well, I don't think that it was done that way. The way it was done he would talk about work to be done and make an estimate of how much it was going to cost and whether we wanted him to do it or not and authorize it. And if we authorized it, why, then the head of the department that it came under, if he didn't have enough men working under him, would go and get them.

Q. All right, did Mr. Gerety have the power to fire anybody, so far as you know?

A. I don't think he did.

Q. Did he have authority to make any purchases for the corporation?

A. Yes, he had authority to make—

Mr. Davis: Q. Would you talk so that I can hear, please, Mr. Harrah?

A. He had authority to make ordinary small purchases in the way of carrying on the affairs of the business, supplies—

The Referee: Q. In the usual and ordinary course of business he was authorized to make purchases; is that right?

A. Yes, ordinary, every day things. If something was of considerable amount, then he came to the Executive Committee for authority to do it.

Q. Did he have authority to borrow money for the corporation? A. No.

The Referee: Are there any other questions? [252]

(Testimony of John Harrah)

Mr. Kitzmiller: Q. Did he have any authority to employ counsel to represent the corporation in connection with any of its matters? A. No.

Q. Did he have any authority to compromise or settle litigation on behalf of the corporation?

A. He did not.

Q. Did he have any right to compromise or settle any claims against the corporation? A. He did not.

Q. Could he modify any of the contracts of the corporation without the consent or approval of the Executive Committee?

Mr. Davis: Just a moment. I object to that on the ground that it is too indefinite as to what they mean by "any agreement."

The Referee: Sustained. Proceed. Make your questions as simple as you can.

Mr. Kitzmiller: Q. After any contract had been entered into under the authorization of the Executive Committee, did Mr. Gerety have any right to either alter or modify or rescind such a contract?

A. He did not.

Mr. Davis: Mr. Reporter, may I have the question read, please?

(The reporter read the question.) [253]

Mr. Davis: Q. That is, with or without the consent of—

The Referee: I am sorry, counsel. Don't ask questions. Proceed.

Mr. Kitzmiller: Q. Did he have the right to pledge the credit of the corporation in connection with any of the obligations of the corporation? A. He did not.

(Testimony of John Harrah)

Mr. Kitzmiller: I believe the question was asked by your Honor whether he had the right to borrow money?

The Referee: Right. The answer was no.

Mr. Kitzmiller: Q. Did he have the right to loan any of the money of the corporation?

A. He did not.

Q. Could he mortgage any of the property of the company? A. He could not.

Q. Could he enter into any litigation for the corporation without the authorization of the Executive Committee? A. He could not.

Q. Did he have any control of the funds of the corporation? A. He did not.

Mr. Davis: Just a moment. I object on the ground that it is too indefinite.

The Referee: That is sustained. The answer may go out.

Mr. Kitzmiller: Q. Could he endorse checks?

A. No, I don't think so. I don't know of any authority [254] he had to endorse checks.

The Referee: Q. Who did endorse them?

A. They were endorsed by a company stamp, "for deposit only."

Q. Didn't he have access to the stamp?

A. I would say that he probably did. The stamp was a stamp and was—endorsing the checks payable to the bank where the deposit was held. I presume he had access to the stamp.

The Referee: Go ahead.

(Testimony of John Harrah)

Mr. Kitzmiller: Q. Do you know who endorsed the checks of the corporation?

A. Well, the only way they were ever endorsed, so far as I know, is to use a rubber stamp which made the checks payable to the bank where—

Q. Who did that?

A. The bookkeeper generally did it.

Q. You spoke of the heads of departments or foremen. By that do you mean the bookkeeper and the electrician, the man who was in charge of the repairs of the pier—I am calling your attention now to 1944. Were those the only heads of departments?

A. Well, let's see, in 1944 there was the bookkeeper—perhaps that is a head of a department. There is the carpenter boss, as I call him, the man that had charge of all the repair work; and there was the electrician, who had charge [255] of the large electrical installations out there—

The Referee: Q. Did he have any janitor force?

A. Yes, they had that, but that was under contract. The contract was made with them.

The Referee: All right.

Mr. Kitzmiller: Q. Can you recall any other head of a department?

A. I don't after the bath house was closed. That has been closed a couple of years. Previously there was a manager of the bath house.

Q. And those bath house people, could Mr. Gerety employ them?

A. No, not without authorization of the Executive Committee.

(Testimony of John Harrah)

Q. Do you know whether or not the company had any credit?

Mr. Davis: I object to that on the ground that it is incompetent, irrelevant, and immaterial, your Honor.

The Referee: Sustained.

Mr. Kitzmiller: In 1944, the time that this—

Mr. Davis: I object on the ground that it is incompetent, irrelevant, and immaterial.

The Referee: Objection sustained.

Mr. Kitzmiller: I believe that is all.

The Referee: Is there any other cross examination?

Mr. Davis: I would—

Mr. Cobb: On that last question, your Honor, I would like [256] to make an offer of proof that at the time that Mr. Davis stated that the company should buy this Cruickshank Company contract the company only had \$2,000 in the bank. It had no credit or means of obtaining any money.

The Referee: That is what the evidence is so far, that they had \$2,000. You don't have to prove your case by cross-examination of your own witness. All right, are there any other questions?

Mr. Davis: Yes.

The Referee: Go ahead.

Redirect Examination.

By Mr. Davis:

Q. Mr. Harrah, is it not a fact that Mr. Gerety, as general manager, had authority to sign leases for one year or less?

A. No, he didn't have any authority to lease at all except as he got the specific authority from the Executive Committee.

(Testimony of John Harrah)

Q. Is it not a fact that on April 10, 1944, he leased the Kraft Ride to Charles Brown without authority from the Executive Committee?

A. No, I don't think so. I never knew him to.

Q. I beg your pardon?

A. I never knew him to do such a thing. I think that in each case where he executed a lease he got authority to do it. [257]

Q. Is it not a fact, Mr. Harrah, that Mr. Gerety was held out by the company as manager of the company with authority to carry on the transactions of the company?

Mr. Cobb: We object on the ground that it is ambiguous, the "transactions of the company"—

Mr. Davis: Q. To carry on the business of the company.

The Referee: Overruled.

The Witness: No, I don't think so. That was not the understanding around the pier at all, that he had authority—

The Referee: Q. Well, Mr. Harrah, if anybody wanted to do business with the Kinney Company, whom would he be referred to?

A. They would be referred to me.

Q. You had a meeting once a week. If somebody called down there this morning and wanted to discuss a matter of business, whom would he be referred to?

A. If they went to the Kinney Company, they would be referred to Mr. Gerety.

(Testimony of John Harrah)

Q. If they went to the office and said, "We want to talk about some business with the Kinney Company," they would be referred first to Mr. Gerety?

A. Right.

Q. And if it was beyond Mr. Gerety's authority or control, they would eventually come to the Executive Committee?

A. If that was the course the person started with.

Mr. Davis: Q. As a matter of fact, the Executive Committee [258] always held Mr. Gerety out as the manager of the company, did it not?

A. He was designated as the manager of the company. Nobody ever said he wasn't, as far as I know.

Q. And every business matter was referred to Mr. Gerety as the manager of the company? A. No.

Q. Is it not a fact that in all of your minutes of the Executive Committee you refer to Mr. Gerety as the manager of the company?

A. I think wherever he is designated in any capacity it's as manager of the company.

Q. And is it not a fact that you never passed any resolution curtailing the right or authority or powers of Mr. Gerety as manager of the company?

A. Well, my impression is there are minutes of the old Directors' meetings; and I don't—I wouldn't know where to tell you to find them. I think there are such things and—but I know the custom, as I have related; and I also know that when the Executive Committee was appointed they were appointed to carry on the business of the company between the meetings of the Board of Directors.

(Testimony of John Harrah)

Q. That is correct, in lieu of the Board of Directors and with the authority of the Board of Directors?

A. No, just what I said.

Q. Do I understand, Mr. Harrah, that you say that the [259] Executive Committee had the duties of carrying on the every-day business of the Abbot Kinney Company?

A. No, I wouldn't say that. I would say just what I did, just what the authorization was—the Executive Committee had the power to carry on the business of the corporation between the meetings of the Board of Directors.

Q. In lieu of the Board of Directors?

A. I didn't say anything about "in lieu" of anything. That is the way it was done, exactly as word for word.

Q. Now is it not a fact that on September 19, 1944, the following took place: (Reading)

"After a discussion was held relative to sending the manager to Chicago in December, 1944, to attend the annual meeting of the National Association of Amusement Parks, Pools, and Beaches, it was approved.

The company to assume the expense of said trip"? Did Mr. Gerety go back there as manager of the Abbot Kinney Company representing the Abbot Kinney Company? A. No, he didn't go at all.

Q. Was he authorized to go back?

A. He was by those minutes at that time.

Q. And he was authorized on the basis of being manager to go back to represent the company?

A. Yes, that's right; it wasn't to represent the company. The company wasn't to be represented—to go back and learn what he could about any amusement de-

(Testimony of John Harrah)

vices, anything that [260] might be interesting and appear to be profitable to install or encourage some one else to install on the Venice Pier. That was the object of sending him back there.

Q. And he was to report back on anything he saw that was interesting and if possible make a deal to bring that stuff out here, was he not?

A. He wasn't to make deals. He was to report back, that's all.

Q. As a matter of fact, if he could have induced people to bring their own equipment back without any expense to the company, he could have done that, could he not? A. He could not.

Q. I see. On your meeting of September 5, 1944 (reading) :

"The manager was instructed to investigate additional toilet facilities on the pier and in the Plaza Building."

The Executive Committee did not do that, did it?

Mr. Kitzmiller: We will stipulate that they did not.

The Witness: No.

Mr. Davis: Q. Then the manager was instructed to carry on that particular activity.

The Referee: It is not necessary to go through those matters and find every time he is referred to as manager. There is not any question: he was referred to as manager and sometimes as general manager; no doubt about that.
[261]

Mr. Davis: I am going through here to show you just his activities, because he had full and complete charge of all the business activities of the company.

(Testimony of John Harrah)

The Referee: Well, introduce the matters into evidence.

Mr. Davis: I think that will be the thing to do. We will introduce all these into evidence.

The Referee: Somebody is going to have to pay for the record, you know.

Mr. Kitzmiller: Why, there are authorizations there for him to spend \$10 in those minutes.

The Referee: I don't see how you are going to add anything to the record. The record is here. He was called the manager.

Mr. Davis: That is all, your Honor.

The Referee: Are there any other questions?

Mr. Kitzmiller: Yes, your Honor.

Recross Examination

By Mr. Kitzmiller:

Q. After Mr. Gerety was discharged as manager, who was appointed manager? A. Frank Williams.

Q. And have you known Frank Williams over a period of years?

A. I have known him 15 years, I guess.

Q. You said he was a former member of the Police [262] Department of the City of Los Angeles, did you not, Mr. Harrah? A. Yes, he was.

Q. Then he retired, did he not?

A. Yes, he was out on the retired plan, I think.

Q. And during a portion of the time he was retired he operated a little ranch, did he not?

Mr. Davis: If your Honor please—

The Referee: Make your objection.

Mr. Davis: —that is incompetent, irrelevant, and immaterial.

(Testimony of John Harrah)

The Referee: Sustained. Proceed.

Mr. Kitzmiller: Q. Do you know what experience, if any, Mr. Williams had in any managerial capacity before he was appointed to the position of manager of the Abbot Kinney Company?

Mr. Davis: I object on the ground that it is incompetent, irrelevant, and immaterial.

The Referee: Sustained.

Mr. Kitzmiller: Q. Do you know of your own knowledge whether or not an attempt was made to fire Mr. Gerety after that meeting of May 4, 1944, that Mr. Davis spoke of? That was the meeting, I believe, that was held partially out on the pier and partially in the office. A. May 3—

Mr. Davis: Just a moment. I object on the ground that [263] it is incompetent, irrelevant, and immaterial.

The Referee: Overruled.

Q. Tell us what you know.

A. All I know is what Mr. Gerety told me. He told me, I think the next day, that Tom Davis came into the office and said—that same evening—and said they had held a meeting and that he had been fired and the Executive Committee dissolved, and that Tom Davis had been elected president of the corporation. And I think he mentioned you had been elected one of the officers, but I don't recall what he said about that.

Mr. Kitzmiller: That is all.

The Referee: Q. Well, did Mr. Gerety retire from his position then? A. No, he didn't.

(Testimony of John Harrah)

Q. Do you know whether or not Mr. Gerety put in all of his time for the Abbot Kinney Company or did he have other businesses or employments?

A. He had no other employment as far as I know.

Q. Was he a salaried man? A. Yes.

Q. How much salary was he paid?

A. He was paid \$500 a month.

Q. \$500 a month?

A. Yes, the last part of his employment he was. Prior to that he was paid a lesser amount. [264]

Q. And he continued to receive that salary up to the time of his retirement in December, 1944, as far as you know? A. Yes, I think so.

The Referee: Anything else? Step down, please.

(Short recess.)

Mr. Harrah: I would like to be excused if I can, your Honor.

The Referee: Is there any objection? May he be excused permanently? Does anybody want him—

Mr. Davis: I think we had better have him back—

The Referee: When?

(Discussion off the record.)

Mr. Cobb: May it be stipulated it is agreed we may call Mr. Pool out of order, due to the fact that he is going to be out of town for the next couple of days, without prejudice to any rights we may have as the result of calling him out of order?

The Referee: So stipulated?

Mr. Davis: So stipulated.

(Discussion off the record.)

The Referee: All right, come forward, please, Mr. Pool.

HAROLD B. POOL,

called as a witness on behalf of the respondents, being first duly sworn, testified as follows:

The Referee: Be seated, please. State your name, please.

The Witness: Harold B. Pool.

Direct Examination

By Mr. Cobb:

Q. What is your profession, Mr. Pool?

A. Attorney.

Q. How long have you practiced in Los Angeles County?

A. Since 1922 or '3, somewhere in there. I don't know the exact date.

Q. Were you ever an attorney for the Abbot Kinney Company? A. Yes, I was.

Q. In reference to what matters?

A. My first employment by them was about three months after the Merchants Building was destroyed by fire, which, as I recall it, was in the fall of 1943, I think.

Q. Did you handle the settlement of the fire—

A. I did some other work for them besides that. My next employment by them was drafting an amendment to the declaration of trust that was drawn which secured the bond issue. And that was shortly after I settled the insurance claim on the Merchants Building; it was in the spring of 1944. [266]

Q. Why was it necessary to draw an amendment to the declaration of trust in connection with the settlement?

A. The original declaration of trust, as I recall it, provided that in case of fire any proceeds from any insurance collected were to be used to either improve the

(Testimony of Harold B. Pool)

destroyed building or erect a new building. And the corporation wanted to use the funds for the purpose of paying some taxes; that is, that funds from the proceeds of settlement with the insurance company, and put up a new building; and to do that they had to amend. The matter never went through. I did draw the amended declaration, but I didn't get enough signatures.

Q. In connection with drawing the instrument did you have occasion to examine the Cruickshank Company contract known as "the sprinkler contract"?

A. I did. I asked for the contract so that my declaration of trust wouldn't be contrary to any provisions in that contract.

Q. Now did you represent Charles Brown prior to 1944?

A. My first employment with Charles Brown was about January, 1943.

Q. What was the nature of the employment?

A. To commence a test case on the legality of the game being conducted down there, which I carried through the Supreme Court for him—successfully, by the way.

Q. Now do you recall a conversation with Mr. Brown in [267] respect to the sprinkler contract in June, 1944?

A. I had a conversation with him at—I won't say it was in June, May, or July; but I know it was before he purchased the contract.

Q. When did that occur?

A. Oh, he buttonholed me out on the pier one night and got a curbstone opinion from me at that time.

(Testimony of Harold B. Pool)

Q. What was said at that time?

A. I met him out on the pier, and I asked him what he wanted to know. And he asked me if it was a legal contract and I told him I thought it was. As I recall, that is as much of the conversation as we had. He did tell me he was thinking of buying it.

Q. Did you have anything to do with the letter of November 6, 1944, addressed to the Abbot Kinney Company by Mr. Brown? A. Indirectly I did.

Q. Will you state what you had to do with that?

A. Some time, either late in September or early in October—I forget the date; but if you will get the date of the first football game between U.C.L.A. and U.S.C., you will have the exact date, because it was following that game I met Mr. Brown on the pier and again in the same manner I met him before. He came up to me and started discussing the sprinkler contract. And he told me that he had received some money on it and some more was due and wanted to know if I [268] could tell him how to get it. At the time I told him the best way to get money was to ask for it, and if he had any proposition to submit to the company to put it in writing and offer it. He asked what kind. I said, whatever you want.

That is the last I heard of it. Mr. Brown testified I was with him in dictating that letter the night before. But I was not. I have nothing to do with that other than that one conversation on the same day of that football game. If you could get that date, you will have the exact date, because I discussed the football game with him in the same conversation. It was the first game of the season with U.S.C.

(Testimony of Harold B. Pool)

Q. Now you and Mr. Casey were employed by the company to contest the involuntary petition?

A. That's right. I did two other bits of work for the Abbot Kinney Company. I also brought an action of ejectment against a tenant up there named Tuman; and I was associated with Mr. Casey in the first opposition made to these bankruptcy proceedings.

Q. And you prepared the stipulation that is attached to the present order to show cause?

A. No, I didn't prepare it. I attended a course of conferences where it was agreed upon. As I recall, Mr. Hunt prepared the final draft. I didn't prepare it—at least I don't think I did.

Q. Was anything said at that time about postponing any hearings upon the controversy over the \$30,000, the sprinkler [269] contract, until after trial of the merits of whether the company was to be adjudicated or not?

Mr. Davis: Just a moment, your Honor, I object on the ground that it is incompetent, irrelevant, and immaterial; has no bearing upon the issues of this matter; and that it has been decided by your Honor's ruling heretofore and by Mr. Dickson's ruling.

The Referee: Mr. Cobb, there is a written stipulation, is there not?

Mr. Cobb: Yes, Mr. Grainger argued that that was ambiguous.

The Referee: Was this gentleman a party to the stipulation?

Mr. Davis: Yes, your Honor.

The Witness: I was one of the attorneys for one of the parties.

The Referee: Where is the stipulation?

(Testimony of Harold B. Pool)

Mr. Davis: The whole matter has been gone into on the motion—

The Referee: Was there an objection made on the ground that there had been an agreement by the parties?

Mr. Grainger: Yes, it was argued—

Mr. Cobb: I pleaded in my answer that this matter was by stipulation agreed to be postponed until after the question of adjudication; that it was premature to bring it up at that time. And I think that we are entitled to go into that. [270]

The Referee: Let me examine the pleadings, then.

Mr. Grainger: May I say this, if your Honor please: that that was one of the motions argued before Referee Dickson, as to whether this trial should proceed.

The Referee: Let me read the pleadings here. You are referring to what answer, Mr. Cobb? Are you referring to the answer of Charles Brown?

Mr. Cobb: Yes, your Honor. I believe it is in the motion—

The Referee: I don't see it. Will you point it out?

Mr. Cobb: It is paragraph V of the objection.

The Referee: I am asking you about your answer first.

Mr. Cobb: I may be in error as to its being in the answer. It's in the objection.

Mr. Kitzmiller: It is the last matter I believe in the objection.

The Referee: Let us find the answer first.

Mr. Cobb: Apparently it is not in the answer except that, without waiving the objections that we have heretofore filed, we answer the—

(Testimony of Harold B. Pool)

The Referee: Then it is not a part of your defense on the merits. All right, just refer briefly to your objection, paragraph V (reading):

"That the parties have stipulated and this Court has approved said stipulation whereby the controversy between this objecting respondent will be postponed [271] until the question of whether the above involuntary proceedings will be dismissed or an adjudication entered, all as provided in the stipulation on file here."

Mr. Cobb: That stipulation provides that (reading):

"The pending motion by the alleged bankrupt to dismiss the said involuntary petition shall be reset for hearing upon the Court's calendar at the earliest possible date in February, 1945, but not later than February 16, 1945, and thereafter proceedings to determine the sufficiency of the said involuntary petition, or amendments thereto, shall be prosecuted with due diligence, and all other matters pertaining to the determination of the solvency or insolvency of the alleged bankrupt, and the commission by it of an act, or acts, of bankruptcy, shall likewise be prosecuted with due diligence. Nothing herein contained shall be deemed to prevent the alleged bankrupt from commencing herein proceedings under Chapter X or XI of the Bankruptcy Act."

The Referee: You did not raise it in your answer, Mr. Cobb; and it is part of your objections to the jurisdiction which were ruled upon by Referee Dickson and which rulings we have adopted. And the objection to the pending question is sustained. [272]

(Testimony of Harold B. Pool)

Mr. Cobb: Q. Now do you know what occurred at the time you were substituted or removed as attorney for the alleged bankrupt?

Mr. Davis: Just a moment. I object to that on the ground that it is indefinite. I don't know what he refers to when he says "do you know what occurred." I think we should know what he is referring to.

The Referee: Sustained.

Mr. Cobb: Q. What occurred at the time you were substituted out of the case, Mr. Pool?

Mr. Davis: Just a moment. I object on the ground that it is indefinite.

Mr. Cobb: That is what I am trying to make it. You would object to its being leading if I told him what—

The Referee: Mr. Cobb, to what portion of the pleadings are you now referring, what allegation of the petition or of the answer?

Mr. Cobb: It is offered on the ground of our objection and our defense that we have urged from the beginning, that the alleged bankrupt here is not a proper party to institute this petition before this Court and this Court is not the proper tribunal to try the controversy.

The Referee: The objection is sustained. Proceed.

Mr. Cobb: That is all.

The Referee: Any questions?

Mr. Davis: Just a moment—no questions. [273]

The Referee: All right, step down. Mr. Pool may be excused, gentlemen?

Mr. Cobb: Yes, your Honor.

Mr. Davis: Yes.

The Referee: All right, call your next witness.

Mr. Davis: We are calling Mr. Gerety as an adverse party, your Honor.

The Referee: All right, come forward, please, Mr. Gerety. Raise your hand and be sworn.

EDWARD A. GERETY,

called as an adverse witness on behalf of the petitioning creditors, having been duly sworn, testified as follows:

The Referee: Be seated, please. What is your name, please?

A. Edward A. Gerety.

The Referee: All right, go ahead, gentlemen.

Direct Examination

By Mr. Davis:

Q. Where do you reside, Mr. Gerety?

A. In Venice, California.

Q. How long have you resided in Venice?

A. Since about 1908.

Q. And were you ever employed by the Abbot Kinney Company? A. I was. [274]

Q. When were you first employed by the Abbot Kinney Company? A. In 1926.

Q. And by whom were you employed at that time?

A. By, I think—Thornton Kinney was the president then.

Q. In what capacity were you employed at that time?

A. As manager.

(Testimony of Edward A. Gerety)

Q. And what did you do as manager?

A. I had charge of the office and looked after the workmen and—well, listen, when are you talking about now, 1926?

Q. That is right.

A. And reported the Board of Directors.

Q. Did you carry on negotiations for leases?

A. Yes, which all have to be approved by the Board.

Q. Did you ever appear before any commissions on behalf of the Abbot Kinney Company; for example, the Board of Supervisors, regarding taxes?

A. Yes, I have appeared since then, not in 1926.

Q. How long were you manager that first time?

A. Up until 1933, until they went in receivership and I was appointed receiver.

Q. During the period from 1926 to 1933 you were general manager of the Abbot Kinney Company?

A. I wasn't the general manager. I was the manager of the Abbot Kinney Company. That's a long time ago and— [275]

Q. You purchased the necessary, every day materials, did you? A. That's correct.

Q. And you hired and fired the employees?

A. No, I didn't hire and fire the employees. I had to appear before a Board before I could hire or fire anybody.

Q. That was before the Board of Directors?

A. Directors, I should say.

Q. How many people did you have in the office there during that period of time?

A. At that time I think we had two.

Q. And what did they consist of?

A. Bookkeeper and—

(Testimony of Edward A. Gerety)

Mr. Cobb: We object on the ground that this is too remote.

The Referee: Mr. Davis, let us get down to the present day.

Mr. Davis: Q. You were appointed as the court receiver? A. Yes.

Q. How long did you serve as receiver?

A. Until in the fall of 1937, I think it was.

Q. Then the receivership proceedings were dismissed at that time?

A. No, as I remember, they went into the 77-B; and I was appointed as a trustee.

Q. You were appointed as trustee under the 77-B proceedings? [276] A. I think that was it.

Q. How long did that proceeding last?

A. Not very long; maybe—oh, four or five months maybe.

Q. Then what happened as far as you were concerned?

A. As far as I was concerned, why, in 1937, I think it was, the company went back as the Abbot Kinney Company; that is, the Abbot Kinney Company went back to the Board of Directors.

Q. And you were employed as manager then?

A. Yes.

The Referee: Q. When was that?

A. I think that was in 1937. That was the same year that that contract was made, that pooling agreement.

The Referee: I see. All right.

Mr. Davis: Q. And you continued that employment until what date?

A. Well, it was in—last fall; I think it was November 15th—

(Testimony of Edward A. Gerety)

Q. Of 1944? A. Yes—or November 30th.

Q. What salary did you receive as manager?

A. I was receiving \$500 a month.

Q. What was the next highest salary to you, and to whom was it paid?

A. I think that was \$300 a month.

Q. And who was that paid to? [277]

A. The bookkeeper.

Q. Mr. Mapes? A. That's right.

Q. And how long has Mr. Mapes been with you?

A. I would say about four years, maybe longer than that; 1939.

Q. Who employed Mr. Mapes?

A. Mr. Mapes, when Berry died,—he was a friend of the other bookkeeper—he came down and talked to me about the position. At that time—I think it was in '40, I either took it before the Board of Directors or before the Executive Committee, if there was one, because I couldn't hire a bookkeeper without the Board knowing.

Q. And you interviewed Mr. Mapes and recommended him to the Board, did you?

A. Interviewed Mr. Mapes; and, as I recollect, brought him before the Board.

Q. And the Board authorized you to make the employment then?

A. Either that or they employed him themselves or had me do it, yes.

(Testimony of Edward A. Gerety)

Q. After you started your new employment in 1937 you attended the meetings of the Board of Directors, did you?

A. Some of them. When they wanted me there, they would request me there and I would have to be there.

Q. As a matter of fact, you attended practically all of [278] the meetings of the Board of Directors, did you not, Mr. Gerety?

A. Sometimes they had Directors' meetings in Los Angeles that I didn't know anything about.

Q. Whenever they had them down at the Kinney Company, you were always present?

A. I wouldn't say always; I was usually present.

Q. And you had full access to all the books of the Abbot Kinney Company, did you?

A. You mean the books of record?

Q. Books of record.

A. Yes, the books of record but not your By-Laws or your Articles of Incorporation or your minutes. Sometimes the minutes were there, and sometimes they had them uptown at your office.

Q. But you had under control and direction the keeping of the books and the possession of them, did you not?

A. Yes, the bookkeeper had them. Of course I didn't—

Q. And the bookkeeper was under your jurisdiction, was he? A. Yes, he would be.

Q. Who else did you have in the office?

A. Well, we usually had a girl there.

(Testimony of Edward A. Gerety)

Q. During all of the time?

A. Of this time, yes. Different ones at different times.

Q. Yes. Now who employs the girls? [279]

A. I think Mapes employed this girl, talked to her and talked to me about it. And then I told him to go ahead and employ her.

Q. You told him to go ahead and employ her. And how long ago was that?

A. Oh, gee, I don't know; she must have been there, I think right, after Mapes came.

Q. And do you recall who the girl was before that?

A. No, I don't.

Q. How many girls would you say you had had there during that period of time, since 1937, the time you went with the company?

A. I would say about—maybe three or four.

Q. And those girls were employed by Mr. Mapes or by yourself; is that correct?

A. Well, if we had the Executive Committee, then I took it up with the Executive Committee before I hired them. As far as—I couldn't hire anybody direct.

Q. But you did, before the Executive Committee was organized, employ the girls, did you?

A. Those matters are usually brought up before the Board of Directors.

Q. Now how about entering into leases? Did you have authority to enter into yearly leases—

A. No, I didn't have.

(Testimony of Edward A. Gerety)

Q. —without the authority of the Board of Directors? [280]

A. No, I didn't. Those leases were usually all discussed at the Board—what are you talking about, the Board or the—there are two periods there.

Q. Let us take the period when the Board of Directors met rather often.

A. When the Board of Directors met, I don't think I ever did. In fact, I know I didn't.

Q. After the Board of Directors, did you proceed to sign leases on behalf of the company?

A. I signed leases when I was told to by the Board of Directors, was all.

Q. When the Board of Directors did not meet, Mr. Gerety, did you sign leases? A. I don't think so.

Q. Did you sign a lease?

A. When was the Executive Committee formed, Mr. Davis, so that I could get this better in my mind?

Q. Well, you tell me, Mr. Gerety. I think you were there. We have set it some place around 1940, January, 1940. But I can get the exact date from—

A. You are talking about 1940 on? Is that the idea?

Q. Let us say from 1940 on.

A. That is when the Executive Committee was formed?

Q. Yes. From that time on did you ever enter into a lease on behalf of the company?

A. Not without authorization. [281]

Q. Did you enter into the Kraft Ride lease with Charles Brown under date of April 10, 1944, for one

(Testimony of Edward A. Gerety)

year without having specific authority from the Executive Committee?

A. I did have authority on that lease; if you will look at the minutes there, some time before that, I think you will see that—

Q. As a matter of fact, Mr. Gerety, many tenants came in and out during a season that you would put in possession without having the matter even discussed with the Executive Committee; isn't that correct?

A. There was very possibly somebody over a week-end or a week or something like that, but never any tenancy, never any tenancy.

Q. But you would bring somebody in for a week-end or a week and give them a booth; is that correct?

A. No, because we didn't want them by the week, and we didn't let them come in.

Q. You just got through stating that whenever you did bring them in over the week-end or for a week—

A. If they did come in, I would have to get authorization from the Board.

Q. As a matter of fact, Mr. Gerety, you let in many tenants without having specific authority from the Executive Committee; isn't that a fact?

A. Not to my recollection.

Q. And you purchased materials on behalf of the company, [282] did you not?

A. I did for the regular—the regular work. Of course anything they were conditioning—

Q. You were doing some repair work all the time?

A. We were doing some repair work all the time.

Q. That was part of your operations there?

A. That's correct.

(Testimony of Edward A. Gerety)

Q. So you had to have materials all the time to carry on that work? A. That's correct.

Q. And whenever you needed any materials for repairing the pier, you would order it through the ordinary business channels? A. That's correct.

Q. And you would employ the workmen, would you, on the pier?

A. No, the foreman would employ the workmen.

Q. When you refer to the foreman—who was your last foreman?

A. The last foreman we had was Fred Sandiford. He was the carpenter on the pier.

Q. Was that the last one that was—

A. He was there when I left.

Q. How long had he been with you?

A. Oh, I think he had been—maybe two years, two years and a half. [283]

Q. I see. And with whom did he discuss his employment, with you?

A. Yes, I knew him—

Q. How long had you known him?

A. He was looking for a job, and I knew him as a construction man.

Q. Did you know something about his background?

A. Yes, I knew about his background.

Q. You thought he was a good man?

A. I did.

Q. And then you went ahead and employed him?

A. No, I am pretty sure I took it up with the Committee.

(Testimony of Edward A. Gerety)

Q. Did you fix the amount of compensation he was to receive?

A. No, he told me what he wanted and that was the amount that we agreed on. Help was so hard to get at that time that we didn't have any choice as to what we would pay anybody.

Q. Did he have some workers there?

A. Yes, he had—oh, all the way from three to five or six in his crew.

Q. Did he interview the workers that would work for him, or—

A. Well, he didn't interview them. He knew them or else he wouldn't hire them. If they were good workers, it was all right.

Q. He had authority to hire them, did he? [284]

A. No, he usually came to me; and in the meantime—

Q. And you would approve it?

A. Of course he knew pretty nearly everybody that was down there.

Q. Before he would hire them, he would come and ask you if it was all right?

A. No, sometimes he would go ahead—if he needed a man, he would have to hire them right then.

Q. Then would he come and tell you he had hired them?

A. When I would go on the job, I would usually see them.

Q. What did you say to him about it?

A. He would say, "I had to hire somebody. It was a little too hard for the three men I had," or "Somebody didn't show up."

(Testimony of Edward A. Gerety)

Q. What did you say?

A. Didn't say anything.

Q. You would say that was all right?

A. I didn't say whether it was all right or not, because he had to have somebody and he was the foreman on the job.

Q. Now what other department did you have down there?

A. Well, we had an electrical department.

Q. That was under the management of whom?

A. Mr. Wires.

Q. You—

A. Who was there when I came.

Q. How long did he stay with you? [285]

A. Oh, he was there until just about a year before I left.

Q. Then whom did you employ?

A. A Mr. Strickland.

Q. What is that? How do you spell it?

A. L-e-o, Leo, S-t-r-i-c-k-l-a-n-d. He is there now.

He was employed the same way.

Q. And Mr. Strickland was responsible to you after he was employed, then, was he?

Mr. Cobb: I object to that on the ground it calls for a conclusion of the witness and has no bearing on the issues of this case—about hiring an electrician and what he does and who he reports to.

The Referee: Overruled.

Mr. Davis: Q. Now if you were dissatisfied with the work that Mr. Strickland was doing would you have discharged him?

(Testimony of Edward A. Gerety)

Mr. Cobb: We object on the ground that it assumes a hypothetical set of facts.

The Referee: Sustained.

Mr. Davis: Q. How many employees did Mr. Strickland have? A. He had one.

Q. He had one? A. That's right.

Q. And who employed him?

A. Mr. Strickland came to me and said that the work was [286] too heavy and he had to have another man.

Q. What did you say to Mr. Strickland?

A. Oh, he said he had a good man; so we hired him.

Q. What compensation was fixed, Mr. Gerety, do you recall?

A. I think it was around \$6 a day.

Q. Now whenever anybody wanted a lease with the Abbot Kinney Company, whom would they come in to see?

A. If they came into the office they would see me.

Q. And would you sit down and discuss with them the availability of space?

A. That's correct.

Q. And discuss with them the possible terms of a lease? A. That's right.

Q. And then would you authorize the drawing of a lease along the lines which you had negotiated?

A. No, I never authorized them before I took them up at the meeting.

Q. After you made all the negotiations, you would present it to the Executive Committee?

A. That's correct. If they approved of it or if they had any suggestions or changes or if they approved of it —sometimes they did not approve of it, didn't like the type

(Testimony of Edward A. Gerety)

of amusement—then of course they wouldn't approve of it and of course there wouldn't be any deal.

Q. But if they approved of it, they would instruct you [287] to go ahead and finish consummating the—

A. Yes, we had a form lease to make up, and all you had to do was write down the terms and the girl could type the lease up.

Q. Now were you in charge of the collections of the money on the pier?

A. Yes, I had to see that the rentals came in.

Q. In other words, it was your responsibility, Mr. Gerety, to see that the moneys were collected when they were due?

A. That's right. If I didn't, the Executive Committee would ask me why they weren't in.

Q. And it was your responsibility to go out and see that the tenants performed the terms of their leases?

A. Yes.

Q. And you generally handled any repairs that were required on the lease, on the property?

A. Just what do you mean by that?

Q. Any repairs that were made you would decide—

A. No, we never made any repairs for any of the tenants. The only thing we kept up was the piling and the decking.

Q. And that was the part that you were in charge of, then? A. That was it.

Q. Now were you manager of the company in June, 1944? A. I was. [288]

(Testimony of Edward A. Gerety)

Q. And you were acting in the same capacity as you had acted since—

A. Let's see—June, 1944? That was after Tom Davis informed me that I wasn't manager any more and that he was president. That was on May 3, as I understand.

Q. But you continued acting as—

A. As long as the Executive Committee was there, I was—I was in general—

Q. And you continued to draw your salary?

A. That's right.

Q. And you drew a salary up until November?

A. That's correct.

Q. Now were you present at any meetings of the Board of Directors at which the F. R. Cruickshank Company was discussed?

A. Board of Directors meetings, you mean?

Q. Yes, at any time when the F. R. Cruickshank Company contract was discussed.

A. Don't get me mixed up now. Keep the dates—

Q. I will try not to get you mixed up. You just tell me if you ever attended a Board of Directors meeting where the F. R. Cruickshank Company contract was discussed?

Mr. Kitzmiller: I object to that on the ground that it is vague and indefinite.

The Referee: It is overruled—whether he ever attended a meeting. [289]

Go ahead and answer the question, Mr. Gerety, please.

The Witness: I said I attended a meeting.

The Referee: If you don't remember it, say so.

The Witness: I don't remember.

The Referee: All right.

(Testimony of Edward A. Gerety)

Mr. Davis: Q. The F. R. Cruickshank Company contract was in your possession as manager of the Abbot Kinney Company, was it not, Mr. Gerety?

A. It was in the safe, yes.

Q. As a matter of fact, you and the office force were the only ones that had access to that safe; isn't that correct?

A. I never had access to it. I never had the combination of it.

Q. When you wanted it you would have to ask Mr. Mapes for it, would you?

A. I would, because I never had the combination.

Q. That was just because you never wanted it, was it not?

Mr. Heap: I will object to that. Mr. Mapes was bonded and responsible for it. Naturally Mr. Gerety didn't want—

The Referee: Proceed.

Mr. Davis: Q. But that Cruickshank Company contract was right there in the office; whenever you wanted it, all you had to do was ask Mr. Mapes to give it to you?

A. That is right, but you usually had it up in your office. [290]

Q. As a matter of fact, Mr. Gerety, I never had it in my office.

The Referee: Gentlemen, you will have to curtail this conversation. We are not going to stay with this case forever. Get down to some business, Mr. Davis.

Mr. Davis: Yes.

(Testimony of Edward A. Gerety)

Q. Now when did you first start negotiations for the purchase of the Cruickshank Company contract?

A. Oh, along about the first of June, 1944, right after the first—not very long before we bought it, a week or ten days before.

Q. Whom did you contact?

A. You mean on the purchase—

Q. About the purchase.

A. Mr. Darling.

Q. How did you first contact Mr. Darling?

A. I think I called Mr. Darling on the phone and made an appointment.

Q. And had you prior to that time discussed the possibility of purchasing it with any one?

A. Yes.

Q. With whom had you discussed it?

A. Mr. Brown.

Q. Had you discussed the matter of purchasing the contract with any one else?

A. Nobody else. [291]

Q. Had you discussed it with John Harrah prior to that time? A. I had not.

Q. What did Mr. Brown say to you when you first mentioned it to him?

A. I met Mr. Brown on the pier one day after we had had a—couple of sprinkler heads had broken off. And I was talking about the sprinkling system. And in the meantime I had been informed that I was out. So I suggested that we would think it over with the idea of buying it. So we talked maybe two or three times. So finally he said he thought it would be a good idea to. And, as I am stock-

(Testimony of Edward A. Gerety)

holder and bondholder, I figured just the same as you, to take care of myself.

Mr. Davis: I move that latter portion be stricken.

The Referee: It may go out.

The Witness: We decided to buy it. We called Mr. Darling up and made an appointment with him and went in and had a talk with him, and he said that some one else was negotiating for it.

Mr. Davis: Q. And did he tell you who that some one else was?

A. No, didn't ask.

Q. Did you know at that time who it was?

A. No, I didn't know who it was. I had an idea who it was.

Q. Hadn't you been advised by Al Newton that M. Philip [292] Davis had an option on it?

A. I had not.

Q. What else was said?

A. So we went up and had a talk with Mr. Darling; and I started talking around \$10,000 for it. And he told Mr. Brown and I that that was out. So in the meantime he said as far as he was concerned he wasn't anxious to sell it because he only had—he said he only had a small part of it and that as far as he was concerned it didn't make any difference but he would get in touch with Mr. West and if Mr. West would consent he would sell the contract. So I think that—he did tell us that he didn't think that it would be any cheaper than \$15,000. So I naturally asked him if he would see what he could do around \$12,500. So then a couple of days later I got a call from Mr. Darling, and he said he couldn't do anything on \$12,500, and that he wouldn't even talk about it

(Testimony of Edward A. Gerety)

and it was \$15,000 or forget about it. So I told him I would let him know in a day or two. So in two or three days I got in touch with Mr. Brown and told him the story and just how they felt about it. So we still decided to go ahead. So we made an appointment and went up to his office and purchased the contract.

Q. Now at the time you purchased the contract did you know how much money the Abbot Kinney Company had in its accounts?

A. Oh, I usually knew how much they had. I was purchasing [293] that contract for ourselves, and I didn't—as far as the company was concerned, I didn't know exactly; but I knew approximately.

Q. Those books were under your jurisdiction, you testified? A. That's correct.

Q. And then what did Mr. Brown say when you reported back to him that Mr. Darling was willing to sell?

A. Well, he said he would think it over, and it looked like he would go ahead. So I met him, I think it was, the same day or the next morning; and then he called me and he said, "Well, if you want to go, let's go ahead with it."

And I want to explain one thing: there at the beach it's a very small town, there is one street or one pier. It is not like in Los Angeles here, where you necessarily have to go to an office. But here you run into the same fellow maybe ten times in one day if you are on the street. That is why a lot of these conversations are held on the street or on the pier.

The Referee: Go ahead.

The Witness: So—

(Testimony of Edward A. Gerety)

Mr. Davis: Q. Then did you decide what percentage interest you would take?

A. Yes, he asked me how much I would want. I said I thought I could go a third on it.

Q. Did he tell you that he would take part of it? [294]

A. He said he would take the other two-thirds.

Q. Did he mention that anybody else had an interest in it? A. He did not.

Q. Did you ever mention to any one that you and Charley Brown and another person owned that contract?

A. I did not.

Q. And then you went up to Hugh Darling's office with the money?

A. With the cashier's checks, yes.

Q. Yes. Now you had—how was your money—

A. My money was in the safe deposit box.

Q. And where was that safe deposit box?

A. One of them is in Los Angeles here at the Security Bank, and one is at Ocean Park in the Security Bank.

Q. You carry your cash in those accounts, do you?

A. I do, yes. And then I have an account here in Los Angeles and one in Venice, too.

Q. You got the cashier's checks where?

A. I got one in Ocean Park, I got one in the Bank of America over here (indicating).

Q. What were the amounts of those?

A. The one in Ocean Park was \$2500.

Q. And what was the other one?

A. The other one over here was \$1500, and I gave Mr. Brown at the Bank in Venice \$1,000 in cash. [295]

(Testimony of Edward A. Gerety)

Q. So that you had two cashier's checks?

A. I had two cashier's checks which shows in the—

Q. One for \$2500, one for \$1500?

A. That is correct.

Q. And you gave Mr. Brown \$1,000?

A. Yes. He was making out—I had some money in the safe at home, and he was making out the check for \$5,000. So I said, "Charley, I don't want to carry this money uptown." So I gave him a thousand dollars. So that was six—he had \$15,000. I had the two cashier's checks, which made \$4,000, and gave him \$1,000, and the two together was \$5,000.

Q. You took that money to Mr. Darling?

A. To Mr. Darling; and we got a receipt for it.

Q. And you obtained that assignment which has been introduced in evidence? A. That is correct.

Q. After you had received the contract, what did you do?

A. I got an assignment from Mr. Brown for my third of the contract.

Q. Yes.

A. And a couple of days later, after we got the contract, I bumped into Al. Newton and told him that we had bought it—things get around there very quick. And he asked me if I wanted to sell him a piece of it. I told him no.

Q. So what did you do?

A. I kept one-third. [296]

Q. What did you then do?

A. Oh—well, that was one day. Then Mr. Williams came in, and he had heard about it. And he came in the office—

(Testimony of Edward A. Gerety)

Q. I am just asking you what you did, Mr. Gerety.

A. All right. So then—oh, I guess it was a week or so later Mr. Brown and I got together, and we thought that the company should pay off the money on the contract.

Q. If I should call your attention to the fact that June 13th was the date on which the assignment was made and June 20th was the date of the Executive Committee meeting at which \$7500 was authorized, would that refresh your recollection as to time?

A. Well, that would make it a week.

Q. So after you got the assignment, what did you do in regard to attempting to collect on it?

A. I got together with Mr. Brown, and we thought that the company should start paying some money on that contract. They had already had a notice to turn the water off, and they had received benefits all this time on the thing, which reduced our insurance rates. The rate under the contract was 92 cents for a hundred; and after they took it off the contract—I mean the sprinkler system—and made it semi-sprinkler—the rate now is \$3.50.

Q. So what did you do then?

A. So Mr. Brown prepared a demand on the company for \$7500. [297]

Q. Was that a written demand?

A. I think it was.

Q. And did you help him prepare that demand?

A. No, I talked to him about it. I didn't help him prepare it.

(Testimony of Edward A. Gerety)

Q. Then what happened to that demand?

A. That demand—as I understand, he came into the Executive Committee with the demand personally. And I was not there—

Q. You were not present at that time?

A. I was not present at that time, no.

Q. You knew that he was going to make the demand on that day, did you?

A. I didn't know whether he was going to make the demand that day or the following week, but we decided to make it.

Q. Did you tell him when the Executive Committee was meeting?

A. I think he knew when it was meeting. The Executive Committee meets regularly every Tuesday at 2 o'clock.

Q. So that, as far as you know, you don't know what took place when he made that demand?

A. I do not.

Q. When was the next—did you talk to Mr. Harrah about the demand, Mr. Gerety?

A. I did not.

Q. Did Mr. Harrah talk to you about the demand?
[298]

A. No, as I remember, the Executive Committee minutes were written up—

Q. Who prepared those Executive Committee meeting minutes as of that date, November 20th, 1944?

A. I don't know whether they made the notes for me to prepare it. Sometimes I wrote it, and sometimes Mr. Harrah or Newton would write them.

(Testimony of Edward A. Gerety)

Q. Do you recall whether you wrote them that day?

A. I know I didn't write them that day.

Q. Did you write them up for that date?

A. No, I did not.

Q. Did you talk to Mr. Carleton Kinney about the demand? A. I did not.

Q. Did Mr. Carleton Kinney come to you and ask you anything about it? A. Not a thing.

Q. Had you told the members of the Executive Committee that you owned an interest in that contract as of that date?

A. Yes, everybody at that time knew I had an interest in it. It was no secret.

Q. And did they ever ask you what you would settle that contract for on behalf of the company?

A. No, they didn't.

Q. No question was raised as to what you and Mr. Brown would take for that contract by the company—

Mr. Kitzmiller: You are speaking now of the corporation, [299] asking him on behalf of the corporation?

Mr. Davis: That is right, Mr. Harrah or Mr. Carleton Kinney or Mr.—

Mr. Kitzmiller: Newton?

Mr. Davis: Al. Newton.

The Witness: No, he didn't say a word.

Q. As a matter of fact, Mr. Newton wasn't present at the time that that \$7500 was paid or authorized by the Executive Committee, was he?

A. I didn't know whether he was or not until after I read the minutes.

Q. You found out at that time?

A. I think so.

(Testimony of Edward A. Gerety)

Q. Now after Mr. Brown made the demand, what happened?

A. Well, there was—the minutes showed that they had been approved. And after the minutes were signed, the bookkeeper made the check.

Q. Did you instruct the bookkeeper to make the check?

A. I don't remember whether I did or not on that. I doubt it, because I wasn't there; and when the girl typed the minutes and they were signed—I don't know whether it was made that day or the next day.

Q. But in any circumstances you knew that the check was being drawn?

A. Yes, either being drawn or had been drawn.

Q. And when it was drawn, did you deliver it to Mr. Brown? [300] A. I did not.

Q. Who delivered that to Mr. Brown?

A. I don't know whether Mr. Brown came into the office and got it from the bookkeeper. That was the usual procedure. I had nothing to do with delivering any checks to anybody or receiving any money.

Q. Did you receive part of that \$7500?

A. I did.

Q. When did you receive your share of it?

A. Oh, I don't know exactly when it was. Some time had elapsed, and I got a check from Mr. Brown.

Q. Was that a cashier's check or—

A. No, just a regular check, as I remember it.

Q. Now after you received the \$2500, did you then make a further demand upon the company for payment?

A. As I recollect, on that—that the water wouldn't be shut off for three or four months or whatever it was; and

(Testimony of Edward A. Gerety)

after the time had elapsed, we thought that something should be done on it as we were still carrying the insurance on that property.

The Referee: I beg your pardon?

A. I said we thought that something should be done as the sprinkling system was still carrying that rate on the property.

The Referee: Q. You said "we were still carrying the insurance on that property." Do you mean for us to understand [301] that you and Mr. Brown were paying the insurance premiums?

A. No, we were furnishing the means whereby they would have the rates.

Mr. Davis: Q. You mean just because that sprinkling system was in there the rates were lower; is that right? A. That's right.

Q. So what did you do?

A. Well, it was some time later than that I had a discussion with Mr. Brown about it. In fact, we talked about it a couple of times and looked the contract over; and we saw that the yearly payments were \$30,000 a year. And after two or three discussions, why, we decided that there would be a payment made on the contract. So Mr. Brown and I discussed it—in his office this happened to be; I remember that one—and he wrote out the demand.

Q. I see. And you were there at the time he wrote out the demand, were you?

A. I don't remember. I know we discussed it. I think it was, oh, maybe on a Sunday, Saturday or Sunday. In the amusement business days don't mean anything to us. So that—it was just before he presented his demand, I

(Testimony of Edward A. Gerety)

know that. So as far as my being there when he wrote it out, I don't think I was.

Q. Were you there when he discussed the matter with Mr. Pool?

A. I was not. I didn't know he even discussed it with [302] Mr. Pool.

Q. Then that demand was served upon the Executive Committee, wasn't it?

A. That's correct.

Q. And you were present at that time, were you?

A. I was not, no.

Q. You did not attend that meeting?

A. I did not attend that meeting.

Q. Ordinarily you would attend the Executive Committee meetings?

A. I had attended them. I was in and out—if they wanted me, if I had anything to bring up; otherwise they discussed matters themselves.

Q. As a matter of fact, you had to be there in order to advise them on the conditions of the business on the pier, did you not, Mr. Gerety?

A. It didn't take me all the meeting to tell them all I had to tell them. If they wanted to discuss things without me, I knew it and wouldn't be in.

Q. The Executive Committee meetings were always held in your private office there on the pier?

A. Yes, they usually were.

Q. So that you had to get out of your office in order for them to hold their meetings?

A. That would be right.

(Testimony of Edward A. Gerety)

Q. And on that particular date, November 7, 1944, at the [303] hour of 2 o'clock, p. m., they held a regular Executive Committee meeting?

A. I think that's correct.

Q. Were you at the meeting when it first started?

A. I wasn't at the meeting at all.

Q. Were you on the pier at that time, do you recall?

A. I am sure I was around some place.

Q. And you knew that Mr. Brown was going to make his demand at that time, did you?

A. I didn't know whether he was going to make it then or the following week. I was in and out all the time there. I didn't have any—

Q. Now, Mr. Gerety, you knew that a special meeting of stockholders was to be held the next day, did you not?

A. Was that the next day?

Q. Yes.

A. I think there was one going to be held. Yes, I knew that.

Q. And you knew that the purpose of that was to elect a new Board of Directors so that we could oust the Executive; isn't that so—rumors travel pretty fast down there, do they not, Mr. Gerety?

A. Well, you hear things, yes.

Q. And you knew that was what it was about?

A. You hear things.

Q. And that was in the wind, that the Executive Committee [304] was going to be ousted from power because of all these things that had been happening; isn't that so?

A. I don't know what you mean by "these things happening."

(Testimony of Edward A. Gerety)

Q. I mean you knew the Executive Committee was going to have its authority terminated the next day after if it could possibly be done?

A. No, I wasn't so sure they would.

Q. You knew also at this time, Mr. Gerety, that the Abbot Kinney Company was in bankruptcy proceedings?

A. I knew that, but I knew there wasn't any merit to it.

Mr. Davis: I move that be stricken.

Mr. Cobb: We submit that is quite material.

The Referee: Deny the motion.

Mr. Davis: Q. But you knew that a petition in bankruptcy had been filed? A. Yes.

Q. And you knew that counsel had been employed to represent the company?

A. Wait a minute, let's see whether I did or not. I think so, yes.

Q. And you knew that the counsel was Hiram Casey and Harold Pool? A. Yes.

Q. And you knew all this on the date on which the demand was made, which was on November 7th? [305]

A. Well, I had heard those rumors, yes.

Q. Now do you know what happened in that Executive Committee meeting?

A. No, I don't know exactly what happened. I know when I came back, why, that they were authorized to pay the check.

Q. When did you come back after they authorized the payment of the check?

A. I am trying to think—oh, it might have been before they got finished or an hour or so later.

(Testimony of Edward A. Gerety)

Q. Could it possibly have been while they were still carrying on the meeting?

A. Could have been that I was in there before or after. I am not quite sure.

Q. Were the minutes drawn up immediately after the meeting?

A. I don't know whether they were drawn up that night or the next morning.

Q. The check of \$30,000 was made payable to Charles Brown and was dated November 8, 1944. Was that delivered to Mr. Brown the morning of the 8th, do you recall?

A. No, I couldn't say whether it was delivered to him on the 7th or the 8th. But if it was delivered on the 8th, I imagine it would have been delivered that morning. I didn't deliver it.

Q. Were you present when it was delivered?

A. No, I was not. [306]

Q. Do you know who delivered it to him?

A. I think Mr. Mapes did. He is the bookkeeper.

Q. Did you instruct Mr. Mapes to draw the check for \$30,000?

A. I think the Committee did, because I wasn't there.

Q. Do you know how much money the Abbot Kinney Company had on its books on deposit or with Mr. Harrah on the 7th day of November, 1944?

A. Oh, I was under the impression it was somewhere around \$40,000, more or less.

Q. How much less, would you say?

A. Oh, maybe \$38,000, something like that.

(Testimony of Edward A. Gerety)

Q. Is \$33,000 closer, Mr. Gerety?

A. I don't remember right now. I thought it was around \$38,000.

Q. How was that check made? Where did the company get the money to pay the check?

A. There wasn't that kind of money in the bank, because we drew that out on account of that judgment against us on appeal. And they were made out to the Kinney Company and were given to the treasurer, Mr. Harrah. And as to whether he brought those checks over to Mr. Mapes, I don't know.

Q. But in any circumstances Mr. Harrah would have had to deposit those checks in order to—

A. No, everything was deposited through the office. If it was 25 cents—nobody had any right to deposit or cash [307] any checks of any kind.

Q. In other words, Mr. Harrah had to bring the checks in for deposit before there was enough in the account to meet the check for \$30,000?

A. That would be right.

Q. As I understand, the reason you did not keep this money in the account was because you didn't want to have your account depleted by an attachment; is that right?

A. Yes.

Mr. Heap: If the Court please, that has been asked and answered at least ten times.

The Referee: Yes. Mr. Davis, go on.

Mr. Davis: Q. After that \$30,000 check was paid, did you receive a part of it?

A. I did.

Q. How much did you receive?

A. A check for \$10,000.

(Testimony of Edward A. Gerety)

Q. That was paid in a check?

A. That's correct.

Q. When did you receive that?

A. A few days later, I guess—or shortly afterwards.

Q. Did you cash that check? A. I did.

Q. What did you do with the money?

A. I bought cashier's checks with it; and then when these proceedings came up, I deposited it with the Court, I gave it [308] to the Court.

Q. The \$2500 that you received, what did you do with that money, Mr. Gerety?

A. Put that in my safe deposit box.

Q. That was in cash, was it?

A. No, it was a check. I told you already it was a check.

Q. That was a cashier's check, was it?

A. I don't think so. I think it was just a regular check.

Q. Did you just deposit the \$2500 check in your—

A. No, I don't keep a checking account down there. I have a checking account in Los Angeles.

Q. I asked you what did you do with the \$2500 you received.

A. I cashed the check and put it in the safe deposit box.

Q. You cashed the check?

A. Yes. That is the way I do business. The amusement business is a little different than you lawyers.

Q. Now when did you first find out that William Harrah had an interest in the contract?

A. I think just before Charley came to me and said he was going to sell Bill a portion of the contract—in

(Testimony of Edward A. Gerety)

fact, he didn't ask me anything; said he had sold the contract, as I recollect.

Q. He just came and told you he sold it?

A. I recollect it that way.

Q. Did you ever talk to John Harrah about the purchase of the contract before purchasing it? [309]

A. I did not talk to John Harrah about the purchase of it.

Q. Did you ever talk to Al. Newton about the purchase of the contract before you purchased it?

A. I don't—I told him about it afterwards and he wanted a piece of it. That means he wanted to buy a portion of it.

Q. Did you ever talk with William Harrah about the possibility of purchasing it?

A. I did not. I haven't seen Bill Harrah for four or five years.

Q. Now how long did your employment last after you received your share of the \$30,000?

A. I don't remember exactly. It wouldn't be very long; it was just about that time you fellows moved in.

Q. You received your share of the \$30,000 immediately after Mr. Brown got it; is that correct?

A. There was some time elapsed there. I don't know exactly—

Q. As a matter of fact, the new Board of Directors didn't take possession of the office down there until some time in December?

(Testimony of Edward A. Gerety)

A. Yes, they did. They took charge there, I think it was the day before—before the first of the month, because I know—

Q. They took charge the date on which we got judgment in the Superior Court determining that the Board had been [310] properly elected?

A. That was in November, I am pretty sure, because you and Rusty come down; and by the time you got there, Rusty had taken charge of everything.

Q. And that was after our action in the Superior Court? A. That same day.

Q. The same day?

A. Yes. You were very—

Q. We were very prompt, weren't we, Mr. Gerety?

The Referee: Gentlemen, will you please proceed?

Mr. Davis: I think that is all, your Honor.

The Referee: Cross-examine, or do you want to call him as your own witness?

Mr. Kitzmiller: Oh, I think call him as our own witness.

The Referee: Does anybody want to examine at this time? Step down. Call your next witness, Mr. Davis.

Mr. Davis: I would like to get a ruling on Carleton Kinney, your Honor, as to whether I can call him as an adverse witness under 21-J. I would like to put him on the witness stand. He was also—although he is not a party to the litigation, he is an adverse witness; and he

was one of the members of the Executive Committee that voted in favor of the payment of both the \$7500 and the \$30,000.

The Referee: There is no doubt about that, is there, that he voted in favor of the payment of the money?

Mr. Cobb: No, your Honor; but I submit that that does not [311] make him an adverse witness under 21-J, because any act that a party participated in would make him an adverse witness if counsel wanted to differ with him on that act.

Mr. Davis: I think this is the very issue before your Honor.

The Referee: I think you should proceed with your examination. If it should appear to be necessary to resort to cross-examination tactics, then we will rule on the question of whether he is an adverse witness.

Mr. Grainger: Probably more important is the question of being bound by—

The Referee: Being bound by his testimony—

Mr. Davis: That is of more importance, I think, your Honor, because he has definitely shown in every action since we have been in this matter that he is an adverse witness. The 21-A proceedings and the whole proceedings indicate that. I don't desire to call him as our witness, but I do feel we are entitled to call him under 21-J. I will put him on for the purposes of qualifying him, subject to the rulings of your Honor.

The Referee: Call the witness. [312]

CARLETON KINNEY,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: Q. What is your name, sir?

A. Carleton Kinney.

Q. How do you spell that, please?

A. C-a-r-l-e-t-o-n.

The Referee: All right, proceed.

Direct Examination

By Mr. Davis:

Q. What is your business or occupation, Mr. Kinney?

A. Well, I am operating the Ship Cafe.

Q. And you are the son of Abbot Kinney, the founder of the Abbot Kinney Company?

A. Yes, I am.

Q. Have you ever held an office in the Abbot Kinney Company? A. Yes, I have.

Q. You were president of the company, were you not, for some time? A. I was.

Q. When were you elected president of the company?

A. Well, I can't fix the year. My father died in 1920; and the elder brothers were president for quite a long space. There were two brothers were president for quite a while, [313] each one of them; but I think that I was probably made president around '36 or '37, about the time that this six-party agreement was formed.

Q. And you have been acting as president ever since then until about November, 1944?

A. About the time you fellows put me out.

Q. That is, when the new Board of Directors was elected? A. Correct.

(Testimony of Carleton Kinney)

Q. And you were president during all that time?

A. Yes.

Q. You were also elected as a member of the Executive Committee about—the latter part of 1938?

A. Well, whenever the Executive Committee was formed, I think I was one member of it.

Q. You were one of the original members of the Executive Committee, were you not, Mr. Kinney?

A. Yes, whatever year that was. I don't recall which year.

Q. And you continued to act as a member of the Executive Committee until it was dissolved by the new Board of Directors in the latter part of 1944?

A. That's right.

Q. You attended the Board of Directors' meetings of the Abbot Kinney Company, did you, from 1937 on?

A. I did.

Q. And did you attend the Executive Committee meetings [314] after you were elected to that office?

A. I did.

Q. Now do you recall in May of 1944 that a notice to the members of the Board of Directors was sent out calling a special meeting for May 3rd?

A. I recall there was a —there was a meeting called, but—I mean the stationery was written from the Davis offices.

Q. From the offices of Nicholas and Davis, was it?

A. Yes, just the date of that I can't recall.

Q. And that called for a special meeting of the Directors of the Abbot Kinney Company?

A. I believe so.

(Testimony of Carleton Kinney)

Q. Yes. Now you refused to attend that meeting along with John Harrah, didn't you?

A. Yes, that's right.

Q. And you refused to do it knowing that we couldn't constitute a quorum of the Board without your appearance?

A. Well, that wasn't the reason for it. I wanted a full Board there. I wanted every member of the Board present or I didn't want a meeting until they could all be present.

Q. In other words, you were not going to be there to constitute a quorum with Helen Kinney Ward back in Oklahoma? A. That could be so.

Q. Yes.

The Referee: Just a minute, Mr. Davis. I think we had [315] better adjourn at this time. Ten o'clock tomorrow morning. All the witnesses are instructed to return at that time.

Mr. Heap: If the Court please, I am here on behalf, as you know, of William Harrah and am trying to co-operate as well as I can by saying as little as I can. I have a very important matter that I promised Judge Harrison would go to trial; and I have asked Mr. Vernon, one of my associates, to sit here tomorrow in the event I cannot be here.

The Referee: That is entirely satisfactory. [316]

Los Angeles, California. Thursday, July 26, 1945. 10:00 o'clock, a. m. session.

The Referee: All right, gentlemen, are you ready?

Mr. Vernon: Your Honor, I am O. S. Vernon, appearing in the stead of Mr. Heap.

The Referee: Thank you, Mr. Vernon. All right, gentlemen, are you ready?

Mr. Davis: Ready, your Honor.

The Referee: Mr. Carleton Kinney is on the stand. Come forward, please, Mr. Kinney. Be seated. You have been sworn.

Mr. Davis: I wonder if we might have that last question, Mr. Reporter?

(The reporter read the following question: "In other words, you were not going to be there to constitute a quorum with Helen Kinney Ward back in Oklahoma?".)

CARLETON KINNEY,

recalled for further

Direct Examination.

By Mr. Davis:

Q. And as a result of your failure to appear at that meeting, the meeting was not constituted as a quorum?

A. I would say so.

Q. Thereafter you continued to serve on the Executive Committee? [317] A. I did.

Q. And you continued to hold meetings of the Executive Committee? A. Yes.

(Testimony of Carleton Kinney)

Q. And you continued to pass upon the problems of the company as they were presented to the Executive Committee? A. Right.

Q. How often did you hold Executive Committee meetings, Mr. Kinney?

A. Usually once a week, a fixed day.

Q. Well, were there times when you didn't hold meetings once a week?

A. Yes, there was.

Q. When was that, do you recall?

A. I can't recall. I mean probably some of the Executive Committee meetings—the minutes of some of the Executive Committee meetings—would show that probably there was no meeting by not having any minutes for that week.

Q. You kept accurate minutes of your meetings, did you?

A. I didn't keep them personally; but the minutes were kept of the meetings quite accurately.

Q. And before you signed them, you always checked them to be sure that they stated what had happened at the meetings?

A. That's right. I always read it before I signed it.

Q. Yes. Now, referring to the sprinkling system contract, when did you first learn that Eddie Gerety and Charley [318] Brown had been negotiating for the purchase?

A. I learned after the purchase was made.

(Testimony of Carleton Kinney)

Q. How long after the purchase was made did you learn?

A. I can't fix the time. It couldn't be possibly any longer than two weeks, and it could have been five or six days afterwards.

Q. Now the first time the matter was officially brought before the Executive Committee was on the 20th of June, 1944, at which time a demand for \$7500 was made; is that correct?

A. Well, there was a demand made. The exact date I don't remember. I think it says the 20th here (indicating). We have read things in court that fixes it the 20th of June.

Q. Just a moment, and I will show you these minutes. I call your attention to the minutes of the regular meeting of the Executive Committee held June 20, 1944, 2 p. m., and signed by John Harrah and another signature purporting to be that of Carleton Kinney. Is that your signature? A. It is.

Q. I call your attention to paragraph II thereof, where it says, "It was ordered that \$7500 be paid on the sprinkler contract to Charles Brown, accepting his offer—"

I ask you, Mr. Kinney, is that the first time that you knew that the contract had been purchased by Charles Brown?

A. No, I believe I knew it a day or two before that.

Q. And who advised you of the purchase?

A. Well, I don't just recall. I think that probably [319] Eddie Gerety—

Q. What did Eddie Gerety say to you?

A. Well, he said that Charley Brown had purchased the sprinkler contract—

(Testimony of Carleton Kinney)

Q. And did he tell you how much Charley Brown had paid for it?

A. He told me, but I don't know whether he told me when he said—whether he told me a couple of days later.

Q. Did he say anything to you about any interest which he claimed to own in the contract?

A. Not at that time.

Q. He did not mention to you at that time, then, that he owned any interest in the contract?

A. Not that I recall.

Q. Now when the meeting was held on the 20th of June, who attended that meeting?

A. Well, there was John Harrah, Eddie Gerety, and myself, as I recall, and Charley Brown.

Q. Eddie Gerety was present at that meeting, as you recall it? A. Yes.

Q. And what was said by Eddie Gerety and Charles Brown, if anything, regarding the obligation due on the contract and the amount which should be paid?

A. I can't state the exact words, but it was to the effect that they wanted \$7500, insisted on having \$7500 to— [320]

Q. Who made that request?

A. That was Mr. Charles Brown.

Q. Mr. Charles Brown. And did Eddie Gerety say anything at that time?

A. I don't believe he did.

Q. Well, did you know at that time that Eddie Gerety claimed to have an interest in the contract?

A. I don't believe I knew at that time that he had.

(Testimony of Carleton Kinney)

Q. You did not know at that time, when the first payment of \$7500 was made, that Eddie Gerety had an interest in the contract? A. That is correct.

Q. Then when did you first learn that Eddie Gerety had an interest in the contract?

A. Well, it was a few days later. I can't state just exactly.

Q. Who told you about it? A. Eddie Gerety.

Q. And where did that conversation take place?

A. I think in the Ship Cafe.

Q. And what was the occasion of that discussion?

A. Well, the Ship Cafe was open for business; and Eddie walked in and mentioned the fact that he had put up some money, part of the money, for the sprinkler contract.

Q. Did you ask him when he had put it up?

A. No. [321]

Q. What did you say to him when he told you that?

A. I didn't say anything, I don't think.

Q. Did you ask him why he didn't tell you that some time before you made that payment of \$7500 that he owned an interest in it? A. No.

Q. If he had told you, would that have made any difference in your vote?

Mr. Cobb: We object on the ground that it calls for the conclusion of the witness and is not asking for testimony on a fact.

The Referee: Overruled.

The Witness: I don't think it would.

Mr. Dais: Q. Now in 1943, January, an offer of the Cruickshank Company to sell the contract to the Abbot Kinney Company for \$10,000 was made to the

(Testimony of Carleton Kinney)

Executive Committee through Al. Newton; isn't that correct?

Mr. Cobb: We object on the ground that it assumes facts not in evidence. The evidence shows the offer was made to Mr. Davis.

The Referee: Sustained.

Mr. Davis: If your Honor please, the minutes I read from show that the offer was made to Al. Newton in 1943.

The Referee: It is immaterial. Eliminate that from your question.

Mr. Davis: Q. Calling your attention, Mr. Kinney, to an [322] offer that was made in January of 1943 to the Abbot Kinney Company to purchase the sprinkling system contract for \$10,000, do you recall that proposition?

A. Yes, I recall that the \$10,000—I don't recall the amount, but there was an offer for us, for the Kinney Company, to purchase the sprinkler contract.

Q. I refer to the minutes of one of the meetings of the Executive Committee, that of January 14, 1943, which reads as follows:

"The offer of H. S. West to cancel the F. R. Cruickshank sprinkler contract for the sum of \$10,000 was proposed by Al. Newton, who voted for the acceptance of the proposition. John Harrah voted no on the proposition. Carleton Kinney was absent from the meeting."

I call your attention that you signed the minutes of the meeting. A. Yes.

(Testimony of Carleton Kinney)

Q. How long after that meeting did you sign the minutes?

A. Well, sometimes, if the minutes were completed, in a day, and sometimes three or four days. But in the course of walking in and out of the office, if that was typed up, it would be handed to me and I would sign it.

Q. And at the time you signed it, you read those minutes? A. Yes.

Q. Did you ask John Harrah at that time why he had voted [323] against buying that contract for \$10,000?

A. At the meeting or before the meeting?

Q. Did you ask him when you saw those minutes? Did you ask him why he had voted against buying it?

A. No, I don't think I asked him.

Q. Did you go to him and tell him that you thought we ought to try to make arrangements to buy that contract at that price?

A. I knew there was no use, because there wasn't any money in the treasury enough to cover that.

Q. Did you make any effort at all at that time, Mr. Kinney, to arrange for the purchase of that contract?

A. Well, I knew the contract was a valuable thing for the Kinney Company to have to get rid of that obligation; but there was only two or three thousand dollars in the treasury and we couldn't borrow any money at the banks for the Abbot Kinney Company and I didn't see any use in trying to fool around, trying to buy it for the Kinney Company when there was no money to buy it with.

Q. Did you discuss it at all with Mr. Harrah?

A. Yes, I think I did.

(Testimony of Carleton Kinney)

Q. What did you say to Mr. Harrah about it?

A. Well, in substance—I can't recall just what I said—I voiced an opinion that it would be a fine obligation to get rid of from the Kinney Company. And then I previously—after I knew about it—I checked the amount of money that [324] was in the company, knew that there wasn't sufficient money to purchase.

Q. Did Mr. John Harrah tell you at that time that he didn't think the contract was worth buying anyway because it was subordinate to the bonded indebtedness and to the taxes of the company?

A. I don't think he said that.

Q. Did he ever tell you that?

A. I don't believe so.

Q. Did he ever tell you that in his opinion the contract didn't have any value so far as the actual liquidation was concerned because it was subordinate to all the other indebtedness?

A. No, I think we had discussed the sprinkling system. And I have been a little bit frightened that somebody might move in with the sprinkling system and tie the company up. And I have spoken to him about that, and—I mean, we owed them a lot of money and it was hard—I mean we didn't have it to pay. And it was better to try to keep them from jumping on the Kinney Company and tying things all up. I mean, there was quite a lot of discussion about the sprinkling system. I mean that from time to time—discussions have gone on for a long time. And I know that—

Q. Is it not a fact, Mr. Kinney, that at the various Directors' meetings, when the matter was discussed, that John Harrah and Lou Halper, supposedly representing

(Testimony of Carleton Kinney)

the bonded [325] interests, always stated that in their opinion the contract had no value and they wouldn't pay one dime on it because there was nothing that could be done to take the bonds from the company as long as there was outstanding—

Mr. Cobb: We object to that, your Honor, on the ground that it is compound; that it is leading and suggestive; and that no proper foundation has been laid.

The Referee: Sustained upon the ground of the form of the question.

Mr. Davis: Q. Is it not a fact, Mr. Kinney, that Mr. Harrah made those remarks?

A. Well, he made some remarks from time to time not to be disturbed about them moving in. He has made various statements like that. Of course the idea is—I mean, the very first time that I can recall that the contract—that it was spoken that it could be bought for \$50,000.

Q. That was about in 1941 or 1942, was it not, Mr. Kinney?

A. As to the year I can't quite place it in my mind, but I mean Rusty Williams had money, and it was discussed that maybe he might pick that obligation up.

Q. As a matter of fact, that was discussed in a Directors' meeting on one occasion at which M. Philip Davis stated that he had been talking to Hugh Darling and that a figure of around \$50,000 had been suggested?

A. Well, I don't recall just that fact. I do remember that the conversation was that Rusty Williams might pick that [326] up or it could be picked up for that amount.

(Testimony of Carleton Kinney)

Q. Now is it not a fact that about the first of June or between the first and the 10th of June, 1944, Al. Newton came to you and said that the sprinkling system contract was still available for \$10,000, and that he thought the company ought to buy it and that if we didn't buy it right away it was liable to be lost because somebody else was dickering for it with Hugh Darling?

A. He never made that remark to me, but I did hear that it was in that condition; that if somebody didn't buy it, it was liable to be purchased or they wouldn't have another chance to buy it.

Q. Who told you that?

A. Well, I can't just recall who it was.

Q. But you do recall that before it was purchased by Charley Brown, just before, that some one did say to you, "Well, if we don't purchase that now, it is liable to be lost to us forever, because somebody is dickering on it."?

A. No, that was mentioned some time before, before this 20th of June.

Q. Well, about when; a couple of weeks before?

A. Well, it seems to me it's quite a time before.

Q. What would you say about that, three weeks?

A. Well, a month or six weeks.

Q. Within that period of a month or six weeks. All right. Now what did you say at that time about the possible purchase [327] of it?

A. Well, I don't recall just what I said.

Q. Did you make any effort at that time to ascertain the availability of that contract for the Abbot Kinney Company? A. No I didn't make any—

(Testimony of Carleton Kinney)

Q. You were president of the company, were you not?

A. Yes, in name only.

Q. Who was president in fact?

A. Didn't have any.

Q. So you made no inquiry, then, from the time you heard that the contract was being seriously dickered for by an outside party and the time that you found out Charley Brown had bought it as to whether you could get it on behalf of the Abbot Kinney Company?

A. I made no effort, because I just thought the—I mean how much talk there was to it and how much just loose language about it—I mean I got kind of tired. There had been so much dickering that I got kind of tired even thinking about it.

Q. At the time Charley Brown appeared before the Executive Committee on the 20th of June and made his demand, what did you say?

A. Well, I said, "I suppose we'll pay the money."

Q. What did John Harrah say?

A. Something similar. I don't recall just what he said.

Q. Did John Harrah tell you he thought it was a good idea? [328]

A. Well, I don't know whether he said so; but apparently it seems that he thought it was a good idea, because he signed it and it was delivered.

Q. As a matter of fact, he told you that he thought it was the thing to do, didn't he?

A. Well, I don't recall any conversation much other than I signed the check, see—I mean he prepared the thing; and when the check was ready, I signed it.

(Testimony of Carleton Kinney)

Q. You mean he just had the check prepared and presented it to you and you signed it without asking any questions about the contract?

A. No, that isn't the way it is done down there anyway.

Q. What was your answer, Mr. Kinney?

A. I say the checks have to go through a lot of monkey business before they are signed. In other words, it takes a couple of hours or so before they are ready to be signed or maybe a day—usually a day.

Q. As a matter of fact, all you had to do was give instructions to Mr. Mapes, who is in that little front office, and then you and Mr. Harrah sign it. What "monkey business" is there that has to be gone through?

A. You can ask the bookkeeper. They have to do this and that and the other thing, and it takes time.

Q. You mean that they would have to take money Mr. Harrah has in his possession and get it over to the bank and deposit it; is that what you mean? [329]

A. No, I don't mean that. I mean if you are in the office and ask for a check, it takes about an hour or two or three or the next day before it is made out.

Q. Now when this meeting was in progress, did you ask Mr. Harrah what he thought about the necessity of paying the money on that contract?

A. No, I don't think I did.

Q. Well, did you raise any question as to the ability of the company to pay \$7500 at that time?

A. No.

(Testimony of Carleton Kinney)

Q. Did you ask Mr. Mapes how much the company had in its account at that time?

A. I knew that it was at least double that amount or three times that amount.

Q. It was at least three times the amount of \$7500 on June 20, 1944?

A. Well, two or three times. At least I know that there was enough to cover a \$7500 check easily.

Q. A \$7500 check? A. That's right.

Q. So the company had a lot of money, so far as you remember it, in June, 1944?

Mr. Cobb: We object on the ground that it calls for the conclusion of the witness and is not the best evidence.

The Referee: Mr. Davis, you keep on going over and over these things. The witness makes the answer, and then you [330] repeat the answer. Let the record stand as it is. That does not help it any.

Mr. Davis: Q. It is a fact, is it not, Mr. Kinney, that at the time that \$7500 was paid the pier was in very bad condition so far as repairs were concerned?

Mr. Kitzmiller: You called him as your witness; and he has been asked the question and has answered it already.

The Referee: Gentlemen, we are going to have to get along. There will be no further conversation between counsel. If there are any objections, they will be made on legal grounds and addressed to the Court.

Mr. Kitzmiller: I object on the ground that the question has been asked and answered and on the further ground that the only possible purpose of this question would be for the purpose of impeaching your own witness.

(Testimony of Carleton Kinney)

The Referee: Sustained. Proceed.

Mr. Davis: On which grounds is that sustained, your Honor?

The Referee: On all grounds it is sustained.

Mr. Davis: If your Honor please, it is not for the purpose of impeachment. Of course I called Mr. Kinney under 21-J, but the purpose is to show that, unless there was some ulterior motive, in good business none of these directors would have done this if there had not been some other motive.

The Referee: All right, we won't go into the argument, Mr. Davis. Proceed. [331]

Mr. Davis: Q. Now did you have an attorney give you an opinion as to the validity of the contract at the time you voted to have that \$7500 paid on account?

A. No.

Q. Did you have any opinion as to the right to turn off the water at that time?

A. My opinion or an attorney's opinion?

Q. Did you have an attorney's opinion?

A. No, I did not.

Q. Did you ask Mr. Harrah what his opinion was?

A. I don't think I did.

Q. Now at the time—you recall when the petition in bankruptcy was filed in this matter?

A. I know that the petition was filed.

Q. When did you first receive knowledge of that?

A. Well, a few days after it had been filed.

Q. And you knew that Hiram Casey and Harold Pool were employed as attorneys for the company?

A. Yes.

(Testimony of Carleton Kinney)

Q. You knew that a notice of a special meeting of the stockholders had been called for November 8 for the purpose of electing a new Board of Directors?

A. I don't recall just the date, but I know that there was a registered notice sent to me, by registered mail. Just the date—

Q. Well, if I— [332]

Mr. Kitzmiller: We will stipulate it was November 8.

Mr. Davis: Q. Do you recall that an Executive Committee meeting was held on November 7th, at which time \$30,000 was authorized to be paid to Charles Brown on the contract?

A. Well, I recall that there was a regular meeting.

Q. Well, I will call your attention to the minutes of November 7th and see if that refreshes your recollection as to the date. A. It's November 7.

Q. And that meeting was held at 2 o'clock of that date? A. I believe so.

Q. Now at that time Mr. Brown came in with a written demand for \$30,000; is that correct?

A. That's right.

Q. And what did you say at that time, if anything, when Mr. Brown made the demand?

A. Well, I read the demand and—I don't think I had much to say.

Q. Did you ask Mr. Mapes, the bookkeeper, how much money the company had available?

A. No, not at that time.

Q. Now what did Mr. Harrah say about the payment of the \$30,000? A. He said it should be paid.

(Testimony of Carleton Kinney)

Q. And did you make any inquiry as to what position the company was in as the result of the bankruptcy proceedings— [333] as to the payment of the \$30,000?

A. Well, I knew that a petition in bankruptcy was filed.

Q. Did you make any inquiry of Mr. Harrah as to what effect that had on the right of the company to pay the \$30,000?

A. Well, I will ride on Mr. Harrah? If I knew that—I mean he has been an attorney, and he knows a little about law.

Q. In other words, you took Mr. Harrah's word for the fact that the payments should be made?

A. Well, no, we were discussing what effect the petition in bankruptcy had on paying that amount, weren't we? I mean I took his—I mean I felt that if his opinion was that we should pay it, that the bankruptcy situation—I mean that I wasn't violating anything on account of the bankruptcy petition being filed.

Q. Mr. Harrah made those statements at that time?

Mr. Cobb: We object to that on the ground that—

The Witness: No, that's what I thought.

Mr. Davis: Q. Was there any statement made by Mr. Harrah?

A. The only statement was that we had better pay it.

Q. Now did you make any inquiry of Mr. Pool, who was one of the attorneys for the company, as to the advisability of paying the \$30,000 on demand of Mr. Brown?

Mr. Cobb: We object on the ground that it has been asked and answered. [334]

The Referee: Sustained. He said he had no legal advice.

(Testimony of Carleton Kinney)

Mr. Davis: I thought that was limited to the \$7500, your Honor. If I am not in error—

The Referee: No, he said he had no legal advice.

Mr. Davis: Q. So you voted to pay the \$30,000?

A. Right.

Q. Now just prior to that time, Mr. Kinney, you had voted to satisfy an obligation of your own to the Abbot Kinney Company of about \$1400 for a bond which you paid around \$600 for; isn't that right?

Mr. Cobb: Just a moment. We object on the ground that it is leading, irrelevant, incompetent, and immaterial; has no bearing on the issues of this case.

The Referee: Sustained.

Mr. Davis: I believe that is all, your Honor.

The Referee: Do you want to cross examine or call him as your own witness?

Mr. Cobb: I haven't any questions.

The Referee: Have you any questions, gentlemen?

Mr. Vernon: No questions.

Mr. Heap: No questions.

The Referee: Thank you, Mr. Kinney.

Call your next witness.

May this witness be excused?

Mr. Davis: Yes, your Honor.

The Referee: All right, Mr. Kinney, you may be excused. [335]

Come forward, please, Mr. Newton.

ALFRED ARTHUR NEWTON,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: Be seated, please, what is your name?

A. Alfred Arthur Newton.

Direct Examination

By Mr. Davis:

Q. What is your business or occupation, Mr. Newton?

A. I am an engineer.

Q. Have you ever been employed by the Abbot Kinney Company?

A. I've been a director of the Abbot Kinney Company for many years.

Q. When did you first become a director of the Abbot Kinney Company? A. I think in 1937.

Q. And did you go on the Board of Directors at the same time as Mr. John Harrah?

A. I did, approximately the same time.

Q. Were you acquainted with Hugh Darling?

A. Yes.

Q. Was Hugh Darling a member of the Board of Directors about that time? [336]

A. I think he was elected a little bit later than I was but approximately the same time.

Q. How long did Mr. Hugh Darling serve on that Board? A. A year or two years.

Q. During the time Mr. Darling was on the Board did you ever discuss the F. R. Cruickshank Company contract?

A. I think that I brought it up at one or two meetings. We had had a general settlement in regard to the Cruick-

(Testimony of Alfred Arthur Newton)

shank contract prior to the time that we all went on the Board.

Q. That was pursuant to the supplemental agreement, was it, dated in December, 1937? A. Yes.

Mr. Kitzmiller: I doubt if it was the supplemental agreement. Isn't it the other agreement rather than the supplemental?

Mr. Davis: No, it is the supplemental.

Q. Do you refer to the supplemental agreement dated the 29th day of December, 1937? A. Yes.

Q. Now from the date of that settlement to the date on which Charles Brown purchased the Cruickshank Company contract was any money paid on account of that indebtedness? A. No.

Q. Who were the members of the Board of Directors of the Abbot Kinney Company during the period that Mr. Darling was on the Board? [337]

A. Mr. John Harrah, myself, Mr. Carleton Kinney, Mr. Sherwood Kinney, I think, during the first part of that time, Mr. Louis Halper, Mr. Tom Davis. I think that was seven.

Q. Now at any of those meetings was the question of the value of the Cruickshank Company contract as a claim against the company discussed?

A. Well, at that time it was concluded that we would carry out the contract of 1937 and pay off the contract.

Q. Are you acquainted with Eddie Gerety?

A. Very well.

Q. How long have you known Eddie Gerety?

A. Well, I guess for 25 years.

(Testimony of Alfred Arthur Newton)

Q. Would you consider yourself a close personal friend of Eddie Gerety's?

A. I have always considered myself so.

Q. Now where do you reside, Mr. Newton?

A. Well, I resided at 46 Club House—45 Club House.

Q. Where is that, in Venice?

A. That is in Venice.

Q. How long have you lived in Venice?

A. From about 1913.

Q. And during most of that time were you acquainted with Eddie Gerety?

A. I think I first knew Eddie about 1919; but I wouldn't say that that was the first.

Q. Now did you know Eddie Gerety when he first became [338] manager of the Abbot Kinney Company?

A. I was away at that time, I believe. I knew Mr. Gerety as manager, and we started to get to know each other very well and have a great deal of confidence in each other from about 1929.

Q. And in 1929 Mr. Gerety was the manager of the Abbot Kinney Company—of your own knowledge?

A. That is correct.

Q. And how long did he continue in that position?

A. Well, he has been manager of the Abbot Kinney Company ever since until a few months ago, except during the time when he was managing it in the capacity of receiver.

Q. But he has continuously been managing the affairs of the Abbot Kinney Company since you have known him and since 1929? A. That is correct.

(Testimony of Alfred Arthur Newton)

Q. Now when you went on the Board of Directors in 1937, state what the Board did, if anything, in regard to continuing Mr. Gerety as manager?

A. Why, continuing him as manager.

Q. And what were Mr. Gerety's duties as manager of Abbot Kinney Company? A. Well—

Mr. Cobb: We object to that on the ground that it calls for the conclusion of the witness; that no proper foundation has been laid; and that no time is fixed. [339]

The Referee: Overruled.

The Witness: Mr. Gerety's duties as manager were to represent the company before the meetings at various times at which the company had to be represented, to take up tax matters before the Board of Supervisors, to hire the people, to fire them when necessary, to recommend to the Board of Directors at the first and later to the Executive Committee various deals that he thought were good for the sale of the property, for the rental of leases, and all of the normal business of the company—wherever the company carried out business with the tenants, Mr. Gerety made his recommendations or carried out the instructions that were given him or took whatever action was necessary.

Mr. Davis: Q. Now did Mr. Gerety's authority continue right up until the time of his discharge in 1944?

A. Never any change in his authority except during the time that he acted as receiver; and I am not sufficiently well acquainted to know what the difference between a manager and a receiver is.

Q. I call your attention to the F. R. Cruickshank Company contract. State whether or not you ever had—whether you ever presented to the Executive Committee—

(Testimony of Alfred Arthur Newton)

an offer to purchase the contract by Abbot Kinney Company? A. I sure did.

Q. When was the first time that you presented that offer to the Executive Committee? [340]

A. We had about a three-day session some time in January, I think it was, 1943.

Q. And who was present and what was said?

A. Well, the first day that we discussed the matter, Mr. Kinney, Mr. Harrah, Mr. Gerety—

Q. Which Mr. Kinney is that?

A. That was Mr. Carleton Kinney—Mr. Harrah and myself were all there.

Q. What was said?

A. And at that time I told them that you had been in touch with Hugh Darling; that Hugh Darling had offered the contract for \$10,500 or \$10,000—I have forgotten which amount is correct, but it shows in the minutes—

Q. The minutes show \$10,000.

A. All right, it was \$10,000—for immediate acceptance; that—I pointed out that we had \$137,000 due; that if we dug up the \$10,000 we would enormously improve the position of the stockholders of the company, we would reduce the liabilities against the company, the whole position of the company would be greatly improved.

Q. What did Mr. Harrah say about that?

A. Well, the first day's argument Mr. Harrah seemed to think that if it was possible for the company to cancel its own debts for a lesser amount technically and properly, it might be a good idea. Then Mr. Carleton Kinney raised the question of the amount that we needed to pay taxes. And I [341] said what would it matter about

(Testimony of Alfred Arthur Newton)

the tax situation when the most that would happen would be that we would have a slight additional amount of interest to pay when we could save such a huge amount for the company and satisfy a creditor who said he would be pleased by it. And I begged and implored them to take action.

Mr. Kitzmiller: I move to strike that "begged and implored."

The Referee: It may go out.

Mr. Davis: Q. What did you say?

A. I said that as long as this debt was outstanding there was a danger that the Cruickshank people would become annoyed and would try to take some action against the thing. Mr. Harrah said he didn't think there was anything much the Cruickshank Company could do. He said that the sprinkling system had got into pretty bad shape, was just old iron, that he didn't think that it was worth pulling out, that—further, it might be a good idea to pay it off at this time if we could get sufficient money together to do it. I pointed out that we had that amount of money. He said that of course he was interested primarily in the bonds and of course the bonds came ahead of any sprinkling contract; that whereas he could see where I would be interested because it would improve the stock position of the company, he considered the tax situation of more importance. Then he said had I talked to Lou Halper about it. [342]

Q. Yes?

A. And I said no, I hadn't. My recollection is that the first day I called up Mr. Halper and couldn't get him. And he said, "Well, I wouldn't take any action without talking to Mr. Halper or Mr. Williams about it."

(Testimony of Alfred Arthur Newton)

The next day he had cooled off completely.

Mr. Kitzmiller: I move to strike that, please.

The Referee: It may go out.

Mr. Davis: Q. The next day—

A. The next day all of the good points that Mr. Harrah had mentioned in connection with settling the deal he seemed to feel had shrunk to very little importance indeed, and he said that they had—

Mr. Kitzmiller: I object to that—

The Referee: Start all over again.

Mr. Davis: Q. If you will just limit this to what was said—

Mr. Kitzmiller: I move the last answer be stricken.

The Referee: It may go out.

The Witness: The next day Mr. Harrah came to the meeting and said that he had talked to Lou Halper and Lou Halper saw no necessity for buying the contract; that he felt we could probably get that deal through any time we wanted; that there was nothing really the Cruickshank people were going to do; and that we had just better let it go. So I called for a vote after arguing with Mr. Harrah about it. And I [343] voted aye, and Mr. Harrah voted nay. Mr. Kinney wasn't there.

Q. Did you at a later time talk to Mr. Kinney regarding it?

A. I talked to Mr. Kinney a number of times in regard to the contract.

Q. And what did Mr. Kinney say?

A. He said that he thought we could get the contract for \$10,000 any time he wanted to. He said that he had talked to John Harrah about the thing, and that John didn't feel it was very important. He thought there was

(Testimony of Alfred Arthur Newton)

nothing really practical that the sprinkler people could do.

Q. Now did you at any later time discuss with Mr. Harrah an offer to sell to Mr. Harrah the sprinkling system contract?

A. I think that we had a conversation—I think that I had a conversation with him shortly after the conversation in March that I talked to Mr. Carleton Kinney.

Q. That was in March of 1943?

A. No, it was in March of 1944. It was, let me see—it was—no, it was later than March.

Q. Well, now, let us go back to your 1943 meeting. Did you have a conference after the 1943 meeting at which Mr. Carleton Kinney was not present?

A. Yes.

Q. Did you then have a meeting with Mr. Carleton Kinney in regard to the Cruickshank Company contract?

A. Let me see if I get your question: Do you mean after [344] John Harrah voted no at that meeting did I ask to open the thing up again?

Q. No, did you see Mr. Carleton Kinney the next day or any time after that and ask—

A. It was two or three days before I saw Mr. Carleton Kinney.

Q. What happened at that time?

A. He said he thought—John did—there was nothing the Cruickshank people could do, and that we ought to spend our money on taxes and that we could go ahead with it any time we wanted to.

Q. Now calling your attention to the month of June, 1944, did you or did you not at that time present to Mr.

(Testimony of Alfred Arthur Newton)

Harrah and Mr. Kinney the question of purchasing the contract for \$10,000 or any other figure?

A. I discussed it with Mr. Harrah.

Q. About when was that?

A. Well, the end of May you went East.

Q. And when you say "you"—

A. I mean you, Mr. Davis.

Q. Mr. Phil Davis? A. Yes, Mr. Phil Davis.

Q. Do you recall on what matter I went East?

A. Yes, you were on a matter that concerned the company.

Mr. Kitzmiller: It would be immaterial unless it was—

The Witness: Give me a date now. [345]

Mr. Davis: Q. Was it Pacific Airmax?

A. Yes, at that time Apco Manufacturing Company, of which I am one of the engineers and one of the partners, was interested in working out a deal with them. And when you returned from that trip, you telephoned me and said you had seen Mr. Hugh Darling in Washington.

Q. Yes.

Mr. Kitzmiller: Just a minute. We object to any conversation between Mr. Davis and his engineer here, Mr. Newton.

The Referee: All right, get down to your conversation with Mr. Harrah. Tell us when it was.

The Witness: That is just what I am trying to do, your Honor.

The Referee: But let us not ramble around.

Mr. Davis: Q. Go ahead and tell us what you told Mr. Harrah.

(Testimony of Alfred Arthur Newton)

The Referee: He wanted to fix the time now.

Mr. Davis: Pardon?

The Referee: Let him fix the time.

Mr. Davis: Q. About what date was it?

A. Before I had the conversation with Mr. Harrah, I had the conversation with Mr. Gerety; and that was on Tuesday, June 6th.

Q. And where did that conversation take place?

A. That took place in the Abbot Kinney office. [346]

Q. And what was said at that time?

A. I went down to attend the Executive Committee meeting; and there wasn't any Executive Committee meeting. And I asked Eddie where the other Committee members were, and he said that Mr. Carleton Kinney had gone out of town and that Mr. John Harrah had been in in the morning and that there wasn't anything of importance to come up.

Q. Well—

A. And that he had gone out. We discussed the affairs of the company a little while. I said, "Well, I think that we should take action very definitely in regard to the sprinkler contract." I said, "I have had word from Phil that we can still go ahead with that program for \$10,000." I said, "Don't you think that we should do something about it?"

He said, "Well, Mr. John Harrah wasn't for it."

And I said, "Well, Eddie, Mr. Harrah has a lot of confidence in you, I believe; and I want you to help me persuade him." I said, "He is the key one in the situation. It is vital to the company to buy this contract up if we can; and will you help me?"

He said he didn't know if he could do anything.

(Testimony of Alfred Arthur Newton)

I said, "Will you try?"

He said, "Yes."

Then two or three days after that I had a telephone conversation with you in which you said that the—

Q. Just a minute, you can't tell my conversation. Now [347] when did you see Mr. Harrah next, if at all?

A. Then I saw Mr. Harrah—to the best of my recollection it was a Thursday or Friday of that week.

Q. And where did you see him?

A. Well, I think I ran into him in the office. I had been looking for him.

Q. And who was present at that time?

A. Oh, the office had its usual complement. I think Gale was there, and I don't remember whether Carleton was wandering in and out or not. I think he was. I think the stenographer was there.

Q. Where did this conversation take place, the inner office or the outer office?

A. The outer office.

Q. What was said at that time?

A. I said, "John, I have heard from Phil Davis; and it's vital for you to take action on the sprinkler contract one way or another. He has got this option, and the option is going to be wound up; and he wants to know what we are going to do. I promised to get hold of you and find out what you would do about it." I said, "I am in favor of our making an arrangement to buy the contract."

And he said, "Well, Al," he says, "I don't think that it is necessary to do it." He says, "The only thing they could do would be to take the pipe out"; and he said, "I don't think the pipe is worth the cost of the labor to take

(Testimony of Alfred Arthur Newton)

it out." And [348] he said, "I don't think we are really financially able to do it now. There are other things we ought to do"; and he says, "I don't think anything is going to happen. I think that you will be able to get the contract any time you want to. Nobody is going to buy that old contract." And he says, "After all, the only thing that could happen would be trouble about our insurance; and the only people that are really interested in that, so far as we are concerned, are the California Bank; and I don't care what the California Bank wants."

I said, "Then you feel that we can't and you won't do it?"

And he said, "Yes."

Q. Now did you later have a conversation with Carleton Kinney regarding it?

A. No, because in the two conversations that I had had prior to that time with Mr. Carleton Kinney he had said that he was—believed, as John did, that that was the situation, that we couldn't buy it up at that time, and that it didn't matter whether we did or not. There was nothing the Cruickshank people could do that would affect us seriously.

Q. When did you first find out that Charley Brown and Eddie Gerety had purchased the contract?

A. It was several weeks after that.

Q. And who gave you that information?

A. Tom Davis called me in and says—

Q. Tom Davis gave you the information?

A. That's right. [349]

(Testimony of Alfred Arthur Newton)

Q. Now did you have a conference with Eddie Gerety at that time?

A. Well, I went down to the office; and I said, "Eddie, what about this sprinkler contract?"

Q. What did he say?

A. He says, "Well," he says, "they asked me to go along with them on getting this contract."

And I says, "Well, who is 'they'?"

And he says, "Charley Brown and somebody else."

"Well," I says, "who is the somebody else, Bill Harrrah?"

And he said he didn't know.

And I said, "How is it divided up?"

And he said, "Oh, I just have a little piece." He said, "I felt that I had to protect myself; I felt that if I had a piece of the contract and as long as I had a chance to get a piece of the contract it would help protect me."

Q. Did he say anything about the amount of money that had been paid on account of it? A. No.

Q. Was anything said at the time about what had been paid for the contract? A. No.

Q. When did you first learn, if ever, the amount that was actually paid by Mr. Brown and Mr. Gerety for the contract?

A. I don't remember when it was I learned that.

Q. Were you present at the Executive Committee meeting [350] at which the payment of \$7500 was authorized? A. No.

The Referee: Q. Why not? Why weren't you at that meeting?

A. Well, your Honor, I don't know whether there ever was such a meeting.

(Testimony of Alfred Arthur Newton)

Q. Well, you were supposed to meet once a week, were you not?

A. Yes, sir, and I was at most of those meetings; but sometimes the Executive Committee—after the Executive Committee consisted of a bloc of one and two—used to have a little meeting whenever it was convenient and then write it up afterwards.

Mr. Davis: Q. You mean the two would have a meeting when they wanted it and write it up and show that you were not there; is that it?

A. The way the minutes were written up was a series of minutes of what took place would be written up and given a date. And sometimes they met on that date, and sometimes they met on some other date. Then there would be space for three signatures. And if you were absent from the Committee meeting and if you approved what was done, you could sign the minutes.

The Referee: All right, go ahead.

Mr. Davis: Q. Now calling your attention to the payment of \$30,000 upon the sprinkler system contract, when did you [351] first learn about that?

A. Well, I think we learned about the 9th or 10th of November. If I recollect, we had a meeting scheduled for the 8th of November and we didn't know about it until a couple of days later.

Q. Did you talk to Eddie Gerety at all after the payment was made? A. The \$30,000 payment?

Q. Yes. A. Yes.

Q. And what was said, if anything, regarding it?

A. I talked to him on all sorts of matters. I don't remember our discussing the \$30,000.

(Testimony of Alfred Arthur Newton)

Q. You were still on the Executive Committee, were you?

A. Well, if I am correct as to the dates of them—the November 8th meeting—I was on the Executive Committee at the time the \$30,000 was passed and was not at the meeting and not informed of the meeting. And I think, if my recollection is correct, that November 8th was the date the stockholders met and changed the Board of Directors. And after the stockholders met and changed the Board of Directors, the Executive Committee was abolished.

Q. Are you acquainted with Charles Brown?

A. Yes.

Q. How long have you known Charles Brown?

A. Well, of course I have known Mr. Brown for some years— [352] I have known him quite well, I should say, for five or six years.

Q. He was employed by the Abbot Kinney Company at one time, was he? A. Yes.

Q. Are you acquainted with William Harrah?

A. Yes.

Q. How long have you known William Harrah?

A. Well, I have known William Harrah since 1937.

Q. Did you ever have occasion to discuss with Mr. John Harrah a lease upon the so-called Robbins Building?

A. Yes.

Q. When did that conversation take place approximately?

A. Well, there was a great many conversations about that building. The first conversation, I presume that—

(Testimony of Alfred Arthur Newton)

Q. Yes, give me the first conversation you recall?

A. The first conversation, I think, was in the Owl Drug Store at the corner of Windward and the ocean front, when John and I were having lunch and John said—

Mr. Cobb: Just a moment, your Honor. May I have the witness instructed to answer the question? He was asked when he had the first discussion with John Harrah about the Robbins Building.

The Referee: Fix the time?

The Witness: About three months before they granted the lease. [353]

The Referee: Q. When was that?

Mr. Davis: Q. Do you recall that date, Mr. Newton? A. No, I don't.

Q. I wonder if we can get that set. I don't know myself—

Mr. Cobb: Can't he give approximately the year? He was very exact about everything else he wanted to bring out.

Q. Do you know what year it was?

The Referee: Q. Do you know what year it was?

A. It must have been about two years ago.

Q. 1943, you think; after the start of the war?

A. Oh, yes, it was after the start of the war. Let me think, your Honor. Maybe I can think of some local incident that will bring that back.

Mr. Davis: Q. What was said at that time?

Mr. Cobb: To which we object on the ground that the lease on the Robbins Building is immaterial and any conversation had between this witness and John Harrah

(Testimony of Alfred Arthur Newton)

is not binding and is hearsay as to my client, Charles Brown; and unless some relevancy is shown—

The Referee: What is your purpose, Mr. Davis?

Mr. Davis: We intend to show that Mr. John Harrah approached Mr. Newton, who was a member of the Executive Committee and therefore had to consent to any lease, and said that the Robbins Building would make an ideal place for a new Bridge or Bingo game; that Mr. John Harrah had employed [354] Mr. Pool to prosecute this action to the Supreme Court—or that Mr. William Harrah had; and that since Mr. William Harrah had paid for the decision of the Supreme Court in the fight that he ought to be given first consideration on that lease; that Mr. Newton stated he was sympathetic towards the position of Mr. William Harrah and that he would certainly consider it. Thereafter they had several more discussions; and when it finally came down to the final drawing up of the lease, Mr. John Harrah said, "Put it in the name of Charley Brown."

The Referee: Go ahead; the objection is overruled.

Mr. Kitzmiller: Let us get the foundation as to time. That was the last question the witness was asked.

The Referee: Mr. Brown is in the court room.

Mr. Brown, do you know when that lease was executed?

Mr. Brown: I think it was in October of 1943.

The Referee: That is your best recollection?

Mr. Brown: I think it was in October of '43.

The Referee: All right.

Mr. Brown: May I just add a word there?

The Referee: No, we will get to you later.

(Testimony of Alfred Arthur Newton)

The Witness: Your Honor, may I find out if Mr. Brown is referring to the lease that was finally executed or the lease that was originally executed?

Mr. Davis: Mr. Brown, was that the lease that was originally executed with Robbins or that you finally signed? [355]

Mr. Brown: When I first discussed it, I talked it over with Mr. Gerety and said I would like to have a lease on the building and at that time—the building was unoccupied for quite a few years.

Mr. Heap: Just a minute—

Mr. Davis: I will have to get those dates, your Honor.

The Referee: You have got to be prepared, Mr. Davis.

Mr. Heap: May the record show that the last question by Mr. Davis was directed to Mr. Charles Brown in the back of the room, and that the answer came from Mr. Brown as far as it came.

The Referee: All that may go out. Let us see if Mr. Newton could tell us the date approximately, what year it was in.

The Witness: Your Honor, I would say it was about three months prior to October, 1943, that this discussion I am talking about took place.

The Referee: Proceed.

Mr. Davis: Q. Who was present at that time?

A. Just myself and Mr. Harrah.

Q. And what was said?

A. Well, Mr. Harrah said that Bill had put up the money and had done all the work to win the suit, and that we wanted to open up the Tango on a larger scale,

(Testimony of Alfred Arthur Newton)

and that he thought that Bill deserved it. I said I sympathized with Bill's efforts to open up the Tango, and that I thought it was a [356] good thing but that I thought the Robbins boys, who only had a tentative arrangement, must be considered; that I didn't want to have two Tangos when they were first opening up, because I didn't think two Tangos was enough business; and that if they got in a fight between Tangos, it would be bad; and that if there was to be any arrangement it must be worked out with the Robbins boys. So then nothing further was said, and Mr. Harrah saw me a few days later or a week or ten days later and said that Bill was going to go ahead and have Charley Brown take the thing over.

And I says well, that I was not particularly interested in giving Charley Brown the lease, but that as long as Bill would be responsible for Charley Brown he could have it that way if he wanted to.

He said yes.

And I says, "Have you straightened it out with the Robbins boys?"

He said well, that Charley Brown would straighten it out with the Robbins boys. One of the boys came down to see me. I think they finally arrived at some program with Mr. Brown about it.

Q. Thereafter a lease was executed in the name of Charley Brown?

A. No, the lease was originally executed—they worked out a matter to have Robbins to continue to take the lease. The lease was executed in the name of Mr. Brown.

(Testimony of Alfred Arthur Newton)

Q. And Mr. Brown has supposedly continued operating it ever since? A. Supposedly.

Q. Did you have any other conversations with Mr. Harrah regarding any other lease down there which would be in the name of Charley Brown?

A. Well, the Dragon Slide lease came to an end. I think that the ending of that lease was—well, it had been hanging fire for a couple of months. But the time I alluded to was in June, I think, of '42, I think it was.

Q. Yes.

A. And we were questioning whether we would renew the lease to the old lessees, and we concluded that we weren't getting enough out of it.

Q. You and Mr. Harrah did this?

A. Yes. We all were in agreement that we weren't getting enough rent. And I think I was the one to move that the lease be canceled and that the people be given their papers to get out. And I suggested that the company take over the operations of the Dragon Slide itself.

And Mr. Harrah said, "Well, whom would we get to run it?"

I said, "Well, we have all got a lot of confidence in Charley Brown's ability. Why not give him a step up and make him not only rent collector but put him in charge of the Dragon Slide? We ought to be able to pay a good salary for doing that, and he is a good man." [358]

John said he was a good man, all right, but he didn't think he would want to do it.

(Testimony of Alfred Arthur Newton)

I said, "Oh, well, John, you have got plenty of influence with Charley Brown. You persuade him to do it." I said, "At any rate you have a talk with him about it and see if he won't go ahead."

Then I left the meeting and went down to Mexico.

Q. What happened when you came back?

A. When I came back, I found that they had rented the Dragon Slide to Mr. Brown instead of putting him in as manager.

Q. And the rental was—how close was that to the other rental that had been paid?

A. The rental was much better.

Mr. Cobb: We move that answer be stricken.

The Referee: I don't understand that.

Q. What do you mean by "much better?"

A. It was 30 per cent instead of 20.

Q. You mean that the company got 30 per cent instead of 20 per cent? A. Yes.

(A short recess.)

Mr. Davis: If your Honor please, Mr. Lou Halper is here. Counsel have indicated that they have no objection if we put Mr. Halper on out of turn, and that they will cross examine Mr. Newton after we finish with Mr. Halper. Mr. Halper is a [359] very busy man; and if he could be accommodated, he would appreciate it very much.

The Referee: Very well. Come forward, please, Mr. Halper.

LOUIS HALPER,

called as a witness on behalf of the petitioning creditors, being first duly sworn, testified as follows:

The Referee: Q. What is your name?

A. Louis Halper.

The Referee: Go ahead, gentlemen.

Direct Examination

By Mr. Davis:

Q. What is your business?

A. Building contractor.

Q. How long have you been in that business?

A. Oh, a little over 25 years.

Q. Are you a director of the Abbot Kinney Company? A. Yes, sir.

Q. How long have you been a director of the Abbot Kinney Company?

A. I think since some time in 1938 or 1939; I wouldn't recall exactly.

Q. Did you go on at the same time Mr. John Harrah went on? [360] A. Yes.

Q. And Mr. Al. Newton? A. Yes.

Q. Have you served as a director ever since that time?

A. I have.

Q. Are you acquainted with John Harrah?

A. Yes, sir.

Q. How long have you known John Harrah?

A. Oh, since the early thirties, say 1931 or 1932.

Q. Are you related to Eddie Robbins?

A. Yes, sir.

Q. What relation are you of Eddie Robbins?

A. He is my brother-in-law.

(Testimony of Louis Halper)

Q. Is Eddie Robbins the one that signed the agreement of December 23, 1937, the so-called bond pool agreement? A. Can I see it?

Mr. Kitzmiller: We stipulate that—

Mr. Davis: That (indicating) is the bond pool agreement, and that is the date. Your answer is yes?

A. Yes.

Q. Now, Mr. Halper, did you have any bonds personally of the Abbot Kinney Company?

A. No, sir.

Q. The bonds that were represented in there were those of your brother-in-law? A. Ed. Robbins.

[361]

Q. During all the time, however, you have represented the interests of Ed Robbins in the Abbot Kinney Company?

A. That's right. He being out of the state, I looked after it from its very inception.

Q. You formed a bond pool with John Harrah, William Harrah, Frank Williams?

A. J. F. Williams.

Q. J. F. Williams—and Eddie Robbins?

A. That's right.

Q. And that bond pool owned in the first instance \$136,000 worth of bonds?

A. Approximately that.

Q. Did you become well acquainted with John Harrah as the result of your relationship in that bond pool?

A. Yes, I did.

(Testimony of Louis Halper)

Q. When did you first become acquainted with Hugh Darling?

A. I think some three or four or five weeks prior to the execution of that bond pool.

Q. And what was the occasion of that meeting?

A. He was representing—oh, I don't remember the name of the company, but Red West is the way we always referred to him.

Q. The Cruickshank Company?

A. The Cruickshank Company, that's right. And Red West at that time attempted to purchase all of our bonds; namely, Robbins, Harrah, and J. F. Williams'. [362]

Q. Did you have any arrangements in that bond pool as to what each of you would do in regard to any other bonds or assets of the Abbot Kinney Company which you might acquire?

Mr. Cobb: To which we object on the ground that it is too remote and if it was reduced to writing, the writing is the best evidence, and if it was not reduced to writing it violates the statutes of fraud.

The Referee: I don't think it was reduced to writing.

Mr. Kitzmiller: What is the materiality—

Mr. Davis: Well, I will withdraw the question. I think if we get down to a later date it would be better.

Q. Calling your attention particularly to the F. R. Cruickshank Company contract, do you recall whether or not any demand was ever made upon Abbot Kinney Company by F. R. Cruickshank Company for its payment?

A. There was never a demand made. I think there was some demands made when Hugh Darling was on the Board of Directors; and every time we had a meeting, he

(Testimony of Louis Halper)

said something about "When are we going to get the money?" But since Hugh Darling has been off of the directorate, there has never been any demand made orally or in writing from Hugh Darling or West, so far as I know.

Q. Were there any discussions, Mr. Halper, at the Board of Directors' meetings regarding the value of that Cruickshank Company contract so far as its payment by Abbot Kinney Company?

A. Yes, there was a number of discussions so far as the [363] payments by the Abbot Kinney Company. I was always—

Mr. Cobb: We object on the ground that—until a foundation is laid.

The Referee: Go ahead.

Mr. Davis: Q. When did those discussions take place?

A. At the different Directors' meetings.

Q. Who was present at those meetings?

A. Well, it's rather difficult to remember everybody that was present, because at some times some of the directors were absent and sometimes they were all there.

Q. The ones you had in mind, state whether or not John Harrah was present?

A. John Harrah was present at almost every meeting, I think every meeting I was there.

Q. That covered all the meetings of the Board of Directors?

A. That's right.

Q. What was said in those meetings in relation to the Abbot Kinney Company, Cruickshank Company contract?

(Testimony of Louis Halper)

Mr. Cobb: To which we object on the ground that it is hearsay as far as respondent Brown is concerned.

The Referee: Overruled.

Mr. Davis: Q. Go ahead and answer, Mr. Halper.

A. You and Tom always wanted the Abbot Kinney Company to purchase that contract. I for one very strenuously objected, because I said from our point of view; namely the bondholders,' [364] the contract was valueless because in a foreclosure it would automatically wipe it out.

Q. What did Mr. Harrah say, if anything, about that?

A. Mr. Harrah agreed with me, with me thoroughly. He and I were always in accord in so far as the Cruickshank Company contract because of our bond position. We were the first lien holders, and Cruickshank was behind us.

Q. At that time were there substantial taxes due on the property also?

A. Yes, there was—well, during this period I would say there was in excess of, oh, \$80,000 in taxes, which from time to time we put on a five-year basis.

Q. Now did you ever have a discussion with Mr. John Harrah about the possible purchase of the Cruickshank Company contract?

A. Yes, we discussed it on a number of occasions.

Q. When was the first occasion as you recall it now?

A. I couldn't recall it because it's over a period of years and that Cruickshank Company contract came up from time to time.

Q. What was said, as you recall, in the first conversation?

A. Well, we disagreed with yours and Tom's theory of attempting to buy the contract, because, as I said, we

(Testimony of Louis Halper)

always took the position that the contract was valueless from our point of view since we were the first lien holders. Mr. [365] Harrah and I were always in accord on that theory; there was no question about that.

Q. Mr. Harrah always said that you should not buy it? A. That's right, yes.

Q. Now did you have a conversation—state whether or not you had a conversation with Mr. Harrah just about January 8, 1943, over the telephone at which time Mr. Harrah stated that Al. Newton was suggesting that the company should buy the contract for \$10,000. It was in January of 1943?

A. I don't remember the dates exactly. I wouldn't know whether it was January of 1943 or February or March. But the conversation I think that you refer to had occurred on a number of occasions in that particular time, because there was always you and Tom and Al. Newton who were always pressing the purchase of that contract from Red West. John Harrah and I always took the stand that we didn't want it. And any time we discussed it on the telephone, it was along these particular lines.

Q. Now getting down to a time just prior to the purchase of the contract by Charles Brown, did you have a conversation with Mr. Harrah about that time?

A. Let's see if I can understand—

Q. Just prior to the time that Mr. Brown purchased it, as you have later found out the date?

A. I didn't know that Brown purchased it until John Harrah told me at a conference in his office between Mr. [366] Williams, yourself, John Harrah, and myself.

(Testimony of Louis Halper)

Q. When did that take place?

A. It took place on a Saturday. Now as the dates I couldn't possibly remember what date it was. But I know that it took place on a Saturday afternoon.

Q. What was the occasion for that meeting?

A. The occasion for that meeting was that Mr. Cradick, Mr. Williams' attorney, had drawn an agreement where the bondholders were to sign—I think the Davis group—to elect Mr. Williams on the Board of Directors and you, Philip Davis, on the Board of Directors. And an agreement was drawn as per our understanding in a conversation prior thereto. Mr. Williams and I took that agreement in for John to sign. We went over that agreement, and John found that he didn't like the phraseology of the agreement. So he wrote it in in ink what it should be. I have a copy of it some place. I don't know whether I can find it or not. And then he said he would have it redrawn in accordance with the correction in the phraseology and send it to Bill to execute. And during that conversation we were informed; that is, Mr. Williams and I—

Q. What did Mr. Harrah say?

A. Oh, after we had agreed on the phraseology of the agreement for the purpose of him sending it to Bill, Williams then referred to the sprinkling contract, whereupon John said, "Oh, we have already bought it."

I says, "Just what do you mean?" [367]

He says, "Well, Charley Brown has an interest and Eddie Gerety has an interest."

And I said, "Well, that's a very fine thing to do."

(Testimony of Louis Halper)

I was rather taken aback and surprised, because just some week or ten days prior, when you called me up and accused John Harrah of trying to buy the contract, I called you all kinds of names I wouldn't want to mention here.

Q. That was before the contract was bought?

A. Yes. And I was taken aback. I says, "What do you mean, you bought it?"

He says, "Well, we got the contract."

And it was all quiet for a moment, because we were so definitely surprised. Finally John says, "But I wouldn't worry about it. You can have whatever portion of it you want up to the portion you are justly entitled to in accordance with the pro rata share of the bonds." And he says, "They've already paid \$7500."

I said, "What for?"

He said, "Well, Mr. Brown threatened to shut the water off."

I says, "That seems silly to me that in all these years Cruickshank threatened to shut the water off, and all of a sudden Brown comes in and threatens to shut it off and you pay \$7500, and that money could have gone to pay both interest and penalties."

So he says, "Well, it would increase the insurance."
[368]

I says, "Well, so far as I am concerned I don't believe I am going to want any of this thing. This thing is full of dynamite."

We left there and went out; and Mr. Williams and I ran into Cradick on the corner of Windward and Ocean Front. And Cradick was representing Williams. He told Cradick—

(Testimony of Louis Halper)

Mr. Kitzmiller: No conversation with Cradick, please.

Mr. Davis: Q. Wasn't Mr. Cradick also representing Mr. Harrah during part of this time?

Mr. Cobb: To which we object on the ground that it calls for the conclusion of the witness and that no foundation has been laid. It is hearsay.

Mr. Davis: Q. Do you know of your own knowledge whether Mr. Cradick was also representing Mr. John Harrah in these bonds arrangements?

A. Well, the meetings that Harrah, Williams, and myself had in Cradick's office—whether he was actually representing him or not, I don't know; but he was looking after the interests of the entire bond pool.

Q. Eddie Robbins' as well as John Harrah's and Frank Williams'? A. Yes.

Q. What was said in that conversation?

Mr. Kitzmiller: I object to that on the ground that it is hearsay.

The Referee: Why do you think you have laid a foundation, [369] Mr. Davis?

Mr. Davis: Well, so far as John Harrah is concerned—

The Referee: How?

Mr. Davis: So far as John Harrah was concerned, your Honor, he was representing him in these bond pool—

The Referee: Who was?

Mr. Davis: Cradick.

The Referee: On the testimony of this gentleman?

Mr. Davis: After all, he said he was in these meetings.

(Testimony of Louis Halper)

The Referee: That is a rather odd way to prove agency by the testimony of a third party. The objection is sustained.

Mr. Davis: Q. When did you first learn that the \$30,000 had been paid?

A. If I could get the date of the stockholders' meeting—

Mr. Kitzmiller: November 8th.

The Witness: November 8th. I think I learned, oh, maybe a week or several days thereafter. I remember that very distinctly, because I jumped right down your throat by saying I demanded the checking account be canceled until such time as the new Board of Directors was in, to write the bank a letter telling them—you said that you couldn't do that. Then we found that the \$30,000 had been paid.

Mr. Davis: I think that is all.

The Referee: Cross examine?

Mr. Cobb: Yes, your Honor. [370]

Cross-Examination

By Mr. Cobb:

Q. Mr. Halper, Mr. Brown was not present when you had this conversation with Mr. Harrah?

A. No, he was not present. But he came in during the conversation and didn't stay very long. Merely asked Harrah for the key and went over to the safe, took out some money, and walked out. I don't believe that lasted over, I should say, three minutes.

(Testimony of Louis Halper)

Q. And this conversation you have related between you and Mr. Williams and Mr. Harrah, did that occur before or after Mr. Brown left?

A. During the conversation.

Q. Well, he came in during the conversation?

A. Yes, during the conversation.

Q. But he did not enter into the conversation, did he? A. No, sir; no, sir.

Q. And in reference to Mr. Harrah's saying that he had acquired the contract, did you ask Mr. Harrah how much he had paid on it?

A. Well, he said that "We paid" or he may have said "Bill" or—he always refers to Bill Harrah in these dealings, and it rather confuses me whether it is he or Bill.

Q. He uses the term "he" in connection with William Harrah? A. That's right. [371]

Q. Now he told you, did he not, that the corporation did not buy the contract? A. Oh, yes.

Q. And how much did he say was paid for the contract? A. \$15,000.

Q. Now just prior to that you had been requested to contact Mr. Darling and ascertain what the contract could be bought for? A. I did.

Q. And you offered Mr. Darling \$12,500?

A. No, I didn't offer Mr. Darling \$12,500. I called Mr. Darling—on this particular occasion—the reason I called Mr. Darling, Mr. Davis called me and accused me of buying the contract. And when I assured him it wasn't so, he said, "It must be John Harrah."

(Testimony of Louis Halper)

I says, "No, it couldn't be John Harrah, because if he would attempt to buy the contract he would certainly tell me about it."

So I called Hugh Darling to find out. I never made him any offer. But Hugh Darling then told me that until such time as his promise to the Davises had expired, which had perhaps another few days to go, he couldn't discuss the contract with anybody.

Q. You had contacted Mr. Darling prior to that time and tried to get an offer out of him as to what the contract could be purchased for, had you not? [372]

A. Yes, I think I did.

Q. And you offered him \$12,500, and he told you he wasn't interested?

A. No, that wasn't it at all. There was no dickering or offering, because he told me that the Davises had it tied up so far as he was concerned for \$10,000.

Q. And when you talked to him and he told you the Davises had it tied up, you understood that the Davises were interested in acquiring it for the stockholders or the interests they represented?

A. No, they were interested in acquiring it for the corporation. There is no question about that.

Q. Now you stated at different times here you were opposed to the corporation's acquiring the contract?

A. That's right.

Q. And that you and John Harrah saw eye to eye on that? A. That's right.

Q. And that was always your position, as I understand it?

A. That was always my position, yes, sir.

(Testimony of Louis Halper)

Q. And the reason for that was that your bonds were a prior lien to the assets down there, over any deficiency claim that might exist under this contract?

A. It was always my understanding, and I think rightly so, that on a foreclosure of a first lien it wipes out anything behind it.

Q. And that is the reason you were not in favor of [373] paying any money on this contract?

A. That's right.

Q. So you, as a director, did not feel the contract had any value to the Abbot Kinney Company?

A. I felt—no, I was talking of my personal point. I never took the—in so far as the contract itself was concerned, in view of the agreement, I felt that the Abbot Kinney Company would benefit by it the same as the bondholders in the event of a foreclosure.

Q. At any time prior to the time that you learned Charley Brown had purchased the contract you were not in favor of the Executive Committee or any officer's buying the Cruickshank contract; is that your testimony?

A. Well, "any time"? No, I didn't testify that Charley Brown bought it.

Q. Well, you know about when he purchased it—any time prior to June 13th, 1944, were you in favor of the Executive Committee or the Abbot Kinney Company's purchasing this conditional sales contract?

A. No, I wasn't in favor of them purchasing the conditional sales contract any more than I was in favor of them paying the \$7500 or the \$30,000.

Q. Now on the payment of the \$7500 you just objected to using money of the company to pay anybody

(Testimony of Louis Halper)

other than something that would benefit the bondholders; was that your position?

A. No, I objected to that \$7500 being paid because Mr. [374] Harrah enjoyed a position of trust as one of the Executive Committee, together with his cohort Mr. Kinney, and took advantage of the situation.

Q. Now as far as you as director were concerned, you instructed the Executive Committee what your pleasure was in the matter prior to June, 1944?

A. That isn't so. We attempted on a number of occasions to eliminate the Executive Committee, because they weren't operating for the benefit of the Abbot Kinney Company. We couldn't get a quorum together.

Q. You mean you couldn't get a quorum of the Abbot Kinney Company together? A. No, sir.

Q. Are you interested in any business down there owned by the Abbot Kinney Company?

A. No, sir.

Q. Mr. Robbins is interested in some—

A. Mr. Robbins is interested; but so far as I am concerned, I don't have one penny's financial interest in any of Mr. Robbins' business down there.

Q. Mr. Robbins owns no business down there?

A. He doesn't own any business down there. He merely rents his fixtures—if I understand you correctly. That is now in the Robbins Building that they had originally constructed.

Q. What businesses are operated by Mr. Robbins?

[375]

A. On the Abbot Kinney pier? None whatever.

(Testimony of Louis Halper)

Q. And they have some property they rent; is that right?

A. No, they did not ever rent. That was arranged for by the Executive Committee. Robbins had the lease, and finally he woke up without a lease and Mr. Harrah had it—or Mr. Brown.

Q. When did that occur?

A. I think it was some time in 1943.

Q. And did you become bitter toward Mr. Brown when that occurred? A. Did I what?

Q. Did you become bitter?

A. Oh, God, no!

Q. That did not displease you or you did not feel any animosity toward—

A. Oh, no, I am not bitter. I would like to correct that. There is nothing bitter or vindictive about it.

Q. Did you have anything to say to Mr. Brown or Harrah when Robbins lost the lease down there?

A. No, because Mr. Brown and Harrah had made arrangements satisfactory to Mr. Robbins, and there was no reason for me to be bitter or resent anything they did. Robbins is perfectly happy; and if he is, I am.

Q. Mr. Brown then negotiated with Mr. Robbins and made a satisfactory deal with him before taking the fixtures over; is that what occurred? [376]

A. Yes, I think that is what occurred.

Q. Did you receive a copy of a letter from the Cruickshank people in New York on or about the 9th of June, 1944, wherein they were threatening to cut off the water?

A. In June, 1944?

Mr. Davis: Might I just show it to him?

Mr. Cobb: Yes.

(Testimony of Louis Halper)

The Witness: I never saw this letter before.

Mr. Cobb: Q. Now this conversation you had where Mr. Williams and Mr. Harrah and yourself were present, in the office of the Abbot Kinney company, was that after the \$30,000 had been paid?

Mr. Davis: Just a moment. I think that you made a mistake as to where it was held. He said in John Harrah's office, as I recall.

Mr. Kitzmiller: I believe he said John Harrah's office.

Mr. Cobb: I will correct that. The conversation you had with Mr. Harrah and Mr. Williams, when did that occur?

A. That occurred on a Saturday afternoon. I wouldn't know the date. It was prior—if I had the date of the stockholders' meeting, I could tell you.

Mr. Kitzmiller: It was November 8th.

Mr. Davis: November 8th.

Mr. Cobb: Q. Was it after that? A. No.

Q. Prior to that? [377] A. Yes.

Q. How long?

A. Oh, it may have been a week or two. I wouldn't recall exactly.

Q. Some time in November? A. Yes.

Q. Did Mr. Harrah, when he spoke about William Harrah and himself, did he say how much interest that he had in the Brown contract or the Cruickshank contract? A. No, he said he controlled it.

Q. Did he say he had a third interest?

A. No, he didn't talk of any interest. He controlled it, and he said that Mr. Williams and myself could have

(Testimony of Louis Halper)

whatever we desired up to our portion of the share of the bonds.

Q. How much did you figure—

A. Mr. Williams has 50 per cent, Mr. Harrah has 25 and Mr. Robbins has 25. Therefore it would be—

Q. Did he tell you how much it would cost you?

A. Yes, he told me it would cost \$15,000.

Q. And you were talking about acquiring a half interest?

A. No, we weren't talking about the acquisition of a half interest. He merely told us, and I said it was full of dynamite, I wouldn't have it.

Q. You said you owned 50 per cent of the bonds, did you not?

A. No, Mr. Williams owned 50 per cent, Harrah 25 per cent, [378] Robbins 25 per cent. Therefore if we had taken our proportionate share according to his offer, Mr. Williams would have had 50 per cent, Mr. Robbins 25, and Mr. Harrah 25.

Mr. Kitzmiller: Can we have this understood, that when we are talking about 50, 25, and 25, that is the bond pool?

The Witness: Of the money in the bond pool.

Mr. Cobb: Q. And you were not interested on behalf of the bondholders in acquiring this contract because you thought your bonds were ahead of it?

A. That's right.

Q. Did you tell Mr. Harrah that was your position?

A. No.

Q. Did you tell him you had changed your position?

A. I didn't tell him anything. That was never brought up.

(Testimony of Louis Halper)

Q. Why did you contact Mr. Darling about buying this conditional sales contract if you were not interested?

A. Well, the Darling incident is as follows: Mr. Darling had contacted me on maybe 50 occasions throughout these years for me to use my influence to have Mr. Williams buy.

Q. To buy what?

A. The contract. And it started up 'way up to \$20,000 and finally got down to zero. The reason I called Hugh Darling and tried to get the information was for the purpose of checking up as to what was going on, because I was hearing stories [379] from Phil Davis and from Tom Davis and I just wanted to know what was going on. Tom Davis had called and first accused me of attempting to buy the contract and then accused Harrah. So I called Hugh Darling purely for the purpose of investigating and to satisfy myself, never intending to buy it because I—had I called Mr. Darling for the purpose of buying it, it would have been for the benefit of the corporation and not myself.

Q. But you were not interested in the corporation's buying it? A. That's right.

Q. You did not want the corporation to buy it?

A. That's right.

Mr. Cobb: That is all.

The Referee: Are there any other questions on cross examination?

Mr. Kitzmiller: Yes, your Honor.

The Referee: Proceed.

(Testimony of Louis Halper)

Cross-Examination

By Mr. Kitzmiller:

Q. Now you speak of the Davis group's being interested as stockholders and your being interested as a bondholder. Is it not a fact that the Davises have an interest in the bonds as well as in the stock?

A. I prefer not to commit myself there, because there is [380] a legal question—there is a question there.

Q. I will reframe the question: You have testified to this bond pool agreement; and, without going into that at all but coming to a later date, say, last year some time, wasn't there some sort of a tentative agreement drawn up which was finally never executed and whereby the Davises were to participate in the bonds to the extent of 25 per cent—and I am not referring to the bond pool agreement? A. Yes.

Mr. Davis: Just a moment. I object to that on the ground that it is incompetent, irrelevant, and immaterial and has no bearing on the case at all. The contract was never executed.

The Referee: Sustained. Proceed.

Mr. Kitzmiller: Q. Now do you know what year it was you talked to Mr. Darling?

A. Oh, over a period of years.

Q. Over a period of years? A. Yes.

Q. Do you know whether or not it was in 1943 or 1944 when he allegedly told you that the contract could be acquired for \$10,000 or that the Davises had an option for \$10,000? A. That's right.

(Testimony of Louis Halper)

Q. That was in 1944?

A. He said he had given the Davises his word. It was then—let's see, I think it was some time in 1944.
[381]

Q. And you never talked to Mr. Darling at all about buying the contract for yourself and Mr. Williams?

A. Well, no, I have never talked to him with that intention. Every time I talked—the last time I talked with him was for the purpose of getting information. But there was never any intent—

Q. Well, in these conversations that you had with Mr. Darling which you say was for the purpose of getting information, did you make the statement to him that you were interested in buying the—

A. Yes, yes, I certainly did. I talked with him as if we were interested in the purchase of it.

Q. And was any price ever discussed?

A. Yes, price was discussed. He thought if I would put in an offer, after the expiration of his promise to Davis, of \$12,500, he thought he could put it over.

Q. After his offer to Davis of \$12,500?

A. No, after his promise to the Davises—from what he told me, he had made a promise to the Davises that they had up to a certain time to come up with \$10,000. If they didn't come up with it and if I made him a cash offer of \$12,500, he thought he could put it over with

(Testimony of Louis Halper)

Red West. But in no event would he commit himself until his agreement had expired with the Davises.

Q. And you don't know what month that was in 1944?

A. Oh, God, no, I couldn't if my life depended on it, [382] remember exactly what day or month or—

Q. Did you ever have the feeling that the Davises were trying to purchase this contract for themselves rather than, as you stated, for the corporation?

A. No.

Q. Did you express yourself at any time to the effect that the Davises were trying to acquire this for themselves?

A. I don't think so. I never had any reason to, because Phil Davis had always called me, and so did Tom, insisting that we buy it.

Q. Always—I didn't hear the last.

A. Insisting that we buy it.

Q. And do you know whether or not they had an option on the contract in 1943, the Davises?

A. I don't know how long their option—when they got their option; but, as I said, Mr. Darling told me that he had given them his word—never an option; it was always that he had given them his word—they had until a specific time in which to purchase it.

Q. Did Mr. Darling tell you in these conversations that they were attempting; that is, the Davises were at-

(Testimony of Louis Halper)

tempting, to buy the contract for the corporation or for themselves?

Mr. Davis: I object to that, your Honor.

The Referee: I will have to sustain it. It makes no difference, gentlemen, whether the Davises were out to defraud this company or not. The Davises are not on trial; and even if [383] they had defrauded the company, that would not excuse any one else for what they might have done. Proceed.

Mr. Kitzmiller: Q. Did you ever have a discussion with Mr. Williams with regard to purchasing the contract for yourselves, you and Mr. Williams?

Mr. Davis: Oh, I object to that, your Honor.

Mr. Kitzmiller: Q. Well, I would rather not lay the foundation as to time and place; but I am just asking you if you had such—

Mr. Davis: I object on the ground that it is incompetent, irrelevant, and immaterial; that no proper foundation has been laid—

The Referee: Sustained on the first ground, that it is incompetent, irrelevant, and immaterial.

Mr. Kitzmiller: Q. I call your attention to some time in May of 1944. Do you remember being in my office with Mr. Williams at that time? A. Yes.

Q. Do you remember at that time discussing—I am sure this is not—if you think anything that was said there in regard to this particular thing was confidential,

(Testimony of Louis Halper)

please advise me and we will not go into it—as I recollect, we were discussing this pooling agreement.

A. The possibility of breaking it?

Q. Yes. A. That's right. [384]

Q. And not discussing anything about this contract that was— A. I remember that very distinctly.

Q. And do you recall at that time that you and Mr. Williams had a conversation with regard to purchasing the contract and that you called Mr. Darling—I believe it was you or Mr. Williams that called Mr. Darling from my office—

A. That may have happened. But tell me a little bit more to refresh my memory.

The Referee: After all, counsel, this Court cannot sit here and listen to this irrelevant matter. I have already ruled that it does not make any difference who tried to buy this contract, Williams or Davis or anybody else.

Mr. Kitzmiller: All right, your Honor, I withdraw the question.

The Referee: Is there any other cross examination? Is there any redirect examination?

(No answer.)

May Mr. Halper be excused?

Mr. Kitzmiller: Yes, your Honor.

The Referee: Court is adjourned until 2 o'clock. All other witnesses are instructed to return at that time.
[385]

2:00 O'Clock, P. M., Session.

The Referee: Have we any witnesses?

Mr. Davis: No, we do not have as yet. Mr. Newton and Mr. Mapes both promised that they would be in my office around 1 o'clock and they did not show up there, and he was supposed to have gotten certain information. I called out, and Mr. Mapes had not even called. But I anticipate they will be here shortly.

The Referee: Well, you all ought to do what the Court does. The Court does not ride street cars; it walks.

Mr. Davis: Might I be excused during this delay, your Honor?

The Referee: By all means.

(A short recess.)

Mr. Newton: Your Honor, I got caught in traffic; and I apologize to the Court.

The Referee: That is all right. This is Mr. Newton. He has been sworn. Is there any more direct examination?

Mr. Davis: I think that I was through, your Honor.

The Referee: Who wishes to cross examine?

Mr. Cobb: I have some questions, your Honor. [386]

ALFRED ARTHUR NEWTON,

recalled for

Cross-Examination

By Mr. Cobb:

Q. Mr. Newton, you became a member of the Executive Committee about what date?

A. When it was created. I don't remember the date it was first created.

(Testimony of Alfred Arthur Newton)

Q. And at the time it was created they set Tuesday of each week for a meeting?

A. I think that the Committee when it was constituted chose its own date of meeting. Sometimes it met on a Tuesday because that was right after the Chamber of Commerce, and sometimes it met on a Wednesday because it suited Carleton Kinney better; and other times it changed over.

Q. During the year 1944 Tuesday was the agreed date, was it not? A. That's as I recollect.

Q. Where were you employed in 1944?

A. In 1944 I was night superintendent of the Apco Manufacturing Company.

Q. And is Mr. Davis or the Davis group associated with you in that?

A. We are all associated together in that enterprise.

Q. And that is Moses Davis and W. Thomas Davis and Philip Davis? [387]

A. Thomas Davis and Philip Davis are directly interested in that. I don't know whether Mr. Moses Davis is a member of that or one of its subsidiaries.

Q. He is the father of Philip and W. Thomas.

A. Yes, I know, sir.

Q. And when this pooling agreement was made in connection with the bond indenture, were you at that time associated with the Davises? A. No.

Q. Did you personally own any stocks or bonds of the Abbot Kinney Company? A. When?

Q. When the pooling agreement was formed?

A. At the time the pooling agreement—you mean the original 1937 pooling agreement?

(Testimony of Alfred Arthur Newton)

Q. Yes.

A. At that time I held in my name 44,000 shares and had under contract from Sherwood Kinney 9,000 shares more, I think it was, of the stock of the Abbot Kinney Company.

Q. Did you own the 40,000 shares, not what you had in your name?

A. Yes, I owned the 40,000 shares subject to a previous contract with them.

Q. And from whom did you acquire your stock?

A. I acquired my stock—you want me to recite all the different individuals? [388]

Q. Well, did you purchase the stock; or was it put in your name to handle for a group?

A. No, I acquired the stock as the result of a contract under which I prevented the company from being foreclosed.

Mr. Davis: I object, your Honor, on the ground that it is incompetent, irrelevant, and immaterial. I don't know why we are going back to that.

The Referee: I think we have a right to know what this gentleman's connections are with the company, and to a certain extent at least, how he acquired those connections.

Q. Tell us as briefly as you can.

A. Yes, your Honor.

Q. All right?

A. In 1929 Sherwood Kinney hired me for a brief time to write a report on the beach development possibilities for Venice. I got to know Mr. Sherwood Kinney very well. And I foresaw the possibilities of mak-

(Testimony of Alfred Arthur Newton)

ing a tremendous beach development program through Venice and through there. And Mr. Sherwood Kinney and I became very intimate friends. I was already an intimate friend of Mr. Gerey, and they had great confidence in me and I in them. And we worked intensively, very, very hard, on the program to develop a magnificent beach development program for the whole Venice area there. And we conceived of the idea that a route to the highway must come down to the ocean front. The street engineers had agreed on that, and the city engineers had [389] agreed on that, and it had been adopted by the various boards; and we conceived the idea that if that road went through there, it would be of great benefit to the Abbot Kinney Company because it would give entrance to all that territory through there and we would be able to have—all the people who wanted to visit the beach could.

Q. Go ahead. A. And you would be able to—

Q. We are not concerned with that. Just get down to how you acquired stock. That is what we want.

A. So the affairs of the Kinney Company were pretty bad, and the foreclosure date was set. Mr. Sherwood Kinney was served a final notice that all of the property of the Abbot Kinney Company was going to be sold. And it was in the depression. And I went up before the Board of Supervisors and persuaded them that it was a very good idea for them to purchase the properties of the Abbot Kinney Company.

Q. Yes.

A. And I made an agreement with Sherwood and his brothers and his sister that if I could save the company by

(Testimony of Alfred Arthur Newton)

forestalling off this foreclosure I would be entitled to 50 per cent of their stock.

Q. And did you get it, Mr. Newton?

A. And I got the 50 per cent of the stock.

Q. Do you still have it?

A. I have about one-third of it. [390]

Q. All right. And did you acquire any other stock in addition to that 50 per cent?

A. I did not acquire it, but as the result of another series of lawsuits there was a settlement made of those lawsuits. And the result of that settlement was we gave an interest in this bond pool to two other members of the Kinney family who were suing. And they assigned their stock to my mother and to Mr. Phil Davis—to my mother because I had got from her and my father's estate continual finances for my expenses so as to give me something to live on in this long period of time I was working on it.

Q. Now what is your present interest in the company right now? What do you claim it is?

A. Well, I claim that—

Mr. Davis: If your Honor please, I might interrupt—

The Referee: Yes.

Mr. Davis: I think it is all reflected in the pooling agreement that is in evidence here.

The Referee: Has it changed since that time? Has it changed since the agreement of December, 1937, which is Gerety's Exhibit 1?

The Witness: Only in respect to the fact that there is now stock that is held in my mother's estate to the extent of half, or I think 23,000 shares.

(Testimony of Alfred Arthur Newton)

The Referee: Q. Your mother has died?

A. Yes. [391]

Q. And has it been distributed out of her estate?

A. It has not been distributed.

The Referee: Proceed.

Mr. Cobb: Q. Out of this 40,000 shares do the Davises have a claim on part of it?

A. They don't have a claim; they have a part of it.

Q. Out of that 40,000 shares how much do the Davises have and how much do you have?

A. All divided equally between us except a small margin of shares that belong to other people—divided between Philip Davis and Thomas Davis and myself.

Mr. Davis: Aren't you in error?

The Witness: Moses C. Davis is the one, that's right. You have no interest in that original agreement.

Mr. Kitzmiller: Q. You are referring to—

Mr. Davis: M. Philip Davis.

The Witness: The 1937 agreement.

Mr. Cobb: Q. You were acting on the Executive Committee on behalf of the stockholders; is that correct?

Mr. Davis: I object on the ground that it is incompetent, irrelevant, immaterial. He was a director of the company.

The Referee: Q. Let us put it this way: Do you know who nominated you for membership on the Executive Committee?

A. Your Honor, it was simply agreed that one man representing the Williams group, one man representing the so-called Newton-Davis group, and one man represent-

(Testimony of Alfred Arthur Newton)

ing the [392] Kinney family should form the Executive Committee.

The Referee: Now we have got it.

Mr. Cobb: Q. This Executive Committee really carried on the business for the Abbot Kinney Company, did it not?

A. If I understand your question correctly, it acted in the place of the Board of Directors when the Board was not meeting.

Q. And they approved leases that were made and deals that were pending and turned down deals; is that generally the way it was worked?

A. When they met—

Q. Would you go to the office during 1944 every Tuesday at 2 o'clock?

A. There wasn't a meeting every Tuesday.

Q. Well, would you go to the Abbot Kinney office on every Tuesday during the year 1944?

A. I went there—Mr. Gerety, when anything important occurred, used to let me know; and if there was not going to be a meeting, there may have been times when I was not there; but I made it my policy to be there on Tuesdays.

Q. Did you go to the office every Tuesday, or did you not?

A. Of course I didn't. I just said so.

Q. And you went only when some one would call you; is that right?

A. No, I went whenever I knew there was going to be an [393] Executive Committee meeting; but sometimes there was no affairs to come before the Committee.

(Testimony of Alfred Arthur Newton)

Sometimes the Committee wouldn't meet for two or three weeks.

Q. How did you know there would be nothing to come before the meeting?

A. When I called up and Mr. Gerety said that Mr. Harrah and Mr. Carleton Kinney were away and had nothing to discuss, I didn't go.

Q. On June 20th you did not go to the company's office at 2 o'clock, did you?

A. I can't remember whether I was there or not. I don't remember any meeting taking place on that date. And I certainly didn't sign any minutes.

Q. Later, the next time you were at the meeting, did you see the minutes of the meeting of June 20th?

A. No, I didn't.

Q. Did you make it a practice to look at the minutes each time you would have a meeting; or did you just—

A. The minutes were generally handed to me to sign if there had been any meetings.

Q. Even though meetings had been held, you did not look at the file or book—

A. I tell you, sir, I relied very much on Mr. Eddie Gerety. He was a man I relied on.

Q. Whether you relied or not, did you—

A. On the 20th? No. [394]

Q. Or you did not on any dates following that?

A. No, that would be taking in a lot of territory.

Q. Did you for the next 30 days look at the minutes?

A. Yes, the minutes were submitted to me.

Mr. Davis: I object on the ground that you are assuming facts not in evidence; that there was a meeting in June, 1944.

(Testimony of Alfred Arthur Newton)

The Referee: Sustained.

Mr. Cobb: I did not ask him whether there was a meeting. I asked him if he looked at the minutes for any meetings—

The Referee: If there were no *minutes* there would be no minutes.

Mr. Kitzmiller: Mr. Cobb was asking as to when he looked at the minutes of June 20th.

Mr. Cobb: That is right.

The Referee: You want to find out when he saw the minutes of June 20th?

Mr. Cobb: Yes.

The Referee: All right.

The Witness: I think about three weeks after June 20th.

Mr. Cobb: Q. And what was the occasion of your seeing the minutes at that time?

A. Well, Mr. Cobb, I discovered that \$7500 had been paid out of the company's assets on a sprinkler contract that Mr. Harrah had said was worthless.

Q. Without explaining to me, will you answer the question, please, what was the occasion for you to see the minutes of [395] June 20, 1944?

A. Curiosity to see what they had written in the book.

Q. Who showed you the minutes?

A. They were just kept in the safe. I think Eddie did.

Q. Did you ask Mr. Gerety to see the minutes?

A. He kept all the papers.

Q. Well, did you ask him?

A. Yes, I asked him.

(Testimony of Alfred Arthur Newton)

Q. What did he say?

A. He showed them to me.

Q. And that was the first time you had seen the minutes of June 20th?

A. As far as I recollect, it was.

Q. And what did you say at that time?

A. Well, I had already discussed the matter with Mr. Gerety.

Q. What did you say at the time he showed you the minutes? A. Just read the minutes.

Q. You didn't say anything? A. No.

Q. Now did you go to the company's office at 2 o'clock on November 7, 1944?

A. No, I didn't know there was any meeting on that day.

Q. Your answer is you did not go to the office, is that right? A. That's right. [396]

Q. And were you in the office on November 8th?

A. I was.

Q. And you attended the stockholders' meeting?

A. That's right.

Q. Who all was present at the stockholders' meeting?

A. Well, there was Mr.—Mr. Harrah was there, and Mr. Pool was there, and Mr. Tom Davis was there. Mr. Phil Davis was there, and Mr. Halper was there, and I was there. Helen Kinney was there, and Mr. Ward was there.

Q. Now did you hear Mr. Pool make any statements at that meeting?

A. He made lots of statements. About what? Maybe I can help you.

(Testimony of Alfred Arthur Newton)

Q. You were there, and will you tell us what statements Mr. Pool had to make?

A. Well, there was argument as to whether he was or was not constituted the attorney for the company at that time.

Q. What did Mr. Pool say?

A. Said he was the attorney.

Q. What else was said?

A. As the result, there was a matter of some discussion about it, and the consensus of opinion of those present was that he wasn't. He said that he represented Mr. Bill Harrah and had a telegram that either he or John proceeded to read to the meeting, saying that—

Mr. Davis: I object on the ground that the telegram is [397] the best evidence.

Mr. Cobb: I am not concerned about that phase of it.

Q. What did you hear Mr. Pool say about the sprinkler contract?

A. I don't remember anything.

Q. Did you hear him state at the meeting or just following the meeting about the \$30,000 payment?

A. I don't remember his talking about the \$30,000 payment.

Q. When did you first hear about the \$30,000 payment?

A. As a matter of fact, I am positive at no time while I was in the room did he say anything about the \$30,000.

Q. When did you first hear of the \$30,000—

A. I think about three days after the meeting.

Q. How did you find out about it at that time?

A. I think Mr. Davis told.

(Testimony of Alfred Arthur Newton)

Q. Now as a member of the Executive Committee did you have anything to do with the books and records of the company? A. No.

Q. And did you have anything to do with the bank account? A. Nothing.

Q. The only information you would have pertaining to the bank account would be what some one might tell you if you asked the question about how much cash there was on hand?

A. The only information I would have would be when we asked our general manager, Mr. Gerety, to make a report or [398] when I asked our auditor as to the condition of it.

Q. Now during the month of June, did you make a request to ascertain what the bank account was?

A. The month of June?

Q. 1944.

A. Yes, I asked Mr. Gerety about that, I think.

Q. When did you ask him?

A. Well, I think the first meeting was supposed to take place was the first Tuesday in June. Now to the best of my knowledge that's about the 6th; and it was about that date that I was in the office waiting for the Executive Committee to take up and I asked Mr. Gerety about the condition of the finances of the company.

Q. Did you at any other date during the month of June ask him about the financial condition of the company?

A. I don't remember whether I did or not. The report was very satisfactory on the early part of June. We had more money then than I expected.

(Testimony of Alfred Arthur Newton)

Q. You did not see a financial statement at that time as to what you owed or what your assets were? They did not make up a financial statement of the company during the month of June? Do you know what a financial statement is?

A. Yes, probably very well. I am just trying to recollect: it was usually our custom to have financial statements in the month of June, that being the sixth month of the year; and I am just trying to recollect whether our auditor was [399] late, due to overpressure of work, or whether it was made at the usual time or not. That I can't remember.

Q. Now do you recall the Executive Committee's turning down any proposed leases that Mr. Gerety submitted to the Committee during the year 1944?

A. The only one that I remember being turned down was in the early part of the year when there was discussion about the leasing of the Bamboo Slide and Mr. Gerety submitted for our consideration an offer on the part of the former owners for a re-lease and we all—I say "we all"; the whole Executive Committee and Mr. Gerety agreed it would be better not to re-lease.

Q. How would Mr. Gerety submit these proposed deals to the Committee? Did he make a written report or an oral report?

A. It just depended. Sometimes he would have a letter from some one. Sometimes he would prepare a brief report as to what was going forward. Mostly, he would just discuss with us informally.

(Testimony of Alfred Arthur Newton)

Q. Then if the Committee approved the deal, would they authorize Mr. Gerety or the president to sign the lease or sign the document on behalf of the company?

A. Well, they would authorize the passage of the lease if they approved of it.

Q. And who would execute it on behalf of the company?

A. Well, whenever the secretary and president were [400] available, they executed it; and when they weren't, Mr. Gerety executed them.

Q. And would you make that provision in your minutes as a rule?

A. I don't remember, Mr. Cobb, if we thought it was necessary to more than simply say the Committee approved this lease and ordered its being drawn.

Q. Do you know of any lease that Mr. Gerety signed on behalf of the company?

A. Well, there are a number of the leases that he signed on behalf of the company.

Q. During the year 1944? A. Yes.

Q. And were there any of those that were not submitted to the Executive Committee?

A. Well, all I can say is, Mr. Cobb, that I wasn't present—

Q. During the times you were present.

A. Was there any lease during the time that I was present?

Q. That he signed that were not authorized by the Executive Committee?

Mr. Davis: I object to that on the ground that it is indefinite. I don't know myself quite what he means.

(Testimony of Alfred Arthur Newton)

The Referee: Overruled. He can answer.

The Witness: Your Honor, I want to get this straight in [401] my mind: do you mean that Mr. Gerety go ahead and sign leases when the Executive Committee said not to?

Mr. Cobb: Yes. Put it that way first.

A. All right, I don't remember Mr. Gerety disregarding any request of the Executive Committee in regard to leases. When the Executive Committee wasn't in session, he carried out the business of the company.

Q. Do you know of any lease that he signed on behalf of the company that was not authorized by the Executive Committee during the period that you were here?

A. I don't remember any.

Q. And did Mr. Gerety ever submit to the Executive Committee a proposal to buy property for the company?

A. To buy property for the company?

Q. Yes. A. You mean to buy land?

Q. Any kind of property.

A. He—if there were any very big orders, he used to sometimes tell us about putting them through. I don't remember his ever having to get permission on any normal business. During the time we were there we never bought any land if that has anything to do with it.

Q. Suppose you were going to buy some equipment to build a Bamboo Slide or something of that character, would he discuss it with the Executive Committee and have it approved before making the purchase? [402]

Mr. Davis: Just a moment. I object to that on the ground that it is assuming facts not in evidence; that it is incompetent, irrelevant, and immaterial; that no proper foundation has been laid.

(Testimony of Alfred Arthur Newton)

The Referee: I will overrule it. Let us see what this witness knows about Mr. Gerety's authority.

The Witness: Now let us take a concrete example: Mr. Gerety, when it was necessary to buy extra supplies for construction work on the pier, used to buy them; and when they were for a large amount, he would sometimes mention the fact to us; and he would do whatever was necessary. If we needed it and he had to buy the supplies, he went ahead and bought them.

Mr. Cobb: Q. You knew that the pier had to be repaired and he would be told to go ahead and see that it was repaired; isn't that right? Didn't the Executive Committee place in his hands the responsibility of seeing that the pier was repaired and of getting the necessary workmen and the materials to carry that out?

A. I don't remember the Committee ever being specific about that. We always found him to be very competent in those things. We felt that he was doing a wonderful lot with a little.

Q. But if he had anything unusual, a deal that was out of the ordinary run of affairs, he would take it up with the Executive Committee; is that right? [403]

A. Well, he told me one time that there was so much lacking that he always liked to, whenever possible, have the approval of the Executive Committee. Now I never heard the Executive Committee say that he couldn't do anything; but when something was of an unusual nature, he used to, if the Executive Committee was meeting, he used to consult them.

Q. And, as a matter of fact, he took up practically everything of any importance during the years 1943

(Testimony of Alfred Arthur Newton)

and 1944 with the Executive Committee as far as you know?

A. All but a few things. And he took those up with the two members of the Executive Committee.

Q. And then if he took those few things up, he took up, then, either with all the Executive Committee or with two members of it, all important matters during those two years?

A. I couldn't say that all important matters were taken up. Mr. Gerety had held his post so long that anything that seemed to him to be good and sound we would go ahead with.

Q. And when the directors voted to remove him in November-December, 1944, you voted against the motion of removal?

A. That's right. I have been very fond of Mr. Gerety and I have voted to support him.

Q. And at the time you made that vote you knew all about this sprinkler contract?

A. Oh, no; didn't I just tell you that I didn't know until three days later about the \$30,000.

Mr. Cobb: May I see the minutes of your December meeting, [404] Mr. Davis?

Mr. Kitzmiller: It was November, November 13th.

Mr. Cobb: Q. I call your attention to the minutes of the corporation of a meeting held on November 13, 1944, in which

"The question of Ed. Gerety's continuance as manager of the company was then discussed. Upon motion duly made, seconded, and carried the following resolution was adopted, that Ed. Gerety be and is forthwith discharged as manager of the company.

(Testimony of Alfred Arthur Newton)

Alfred A. Newton voted no."

Did you so vote at that time?

A. That is correct.

Q. And at that time you knew that the \$30,000 had been paid on the sprinkler contract?

Mr. Kitzmiller: I think, Mr. Cobb, you are in error. I think that—

The Witness: Where does it say I knew about the \$30,000?

Mr. Cobb: Q. Didn't you tell us about three days following the meeting of the stockholders on November 8th—

A. I said I wasn't sure; I thought it was a few days after that.

Q. Didn't you testify that, following the meeting of the stockholders, some three days, you discovered that the \$30,000 had been paid out on the sprinkler contract?

A. Yes, I said that I thought a few days afterwards. Evidently I didn't learn of it until a week later. [405]

Q. Hadn't you learned on November 13th that the \$30,000 had been paid?

A. I don't remember of having known of it until after that meeting.

Q. Didn't you know it at that meeting?

A. If I had known it at that meeting, I wouldn't have voted the way I did.

Q. Did you know it at that meeting?

A. No, I didn't know it.

Q. At that meeting they changed the bank account, did they not, the signatures of the bank account?

A. They did.

(Testimony of Alfred Arthur Newton)

Q. And was it not suggested that a letter be written to the bank withdrawing the right of any of the former officers to sign checks? A. That's right.

Q. And wasn't the ground given for that change that this \$30,000 had been drawn out?

A. I don't remember it so.

Q. You remember at that meeting resolutions were passed about bringing actions to recover this money that was paid on the sprinkler contract?

A. At that time I didn't know about the \$30,000. I know that there was a resolution to recover the \$7500.

Q. And also the \$30,000?

A. I don't know that. It might be so. [406]

Q. Wasn't the firm Nicholas and Davis employing Mr. Cradick to make some investigation and take some action?

A. In connection with the sprinkler contract, yes, Mr. Cobb.

Q. And there was discussed at the stockholders' meeting the \$7500 payment that had been made on the sprinkler contract, was there not?

A. The stockholders' meeting?

Q. Yes.

A. I don't remember its being discussed. You have the minutes of the meeting. We spent almost all that time arguing about the stock.

Q. Now at these previous meetings of the Board of Directors of the company had it been discussed about what the company should do in respect to the sprinkler contract?

A. You say had it been discussed at previous meetings?

(Testimony of Alfred Arthur Newton)

Q. Yes. A. Of the Board of Directors?

Q. Yes.

A. Well, there hadn't been any Board of Directors' meetings due to the fact that we never could get two directors to attend for about a year and a half. You mean prior to that time?

Q. Yes.

A. Well, I don't remember anything about the sprinkler contract coming up at the Board after we had signed a [407] supplemental contract that prevented the statute of limitations running on the Cruickshank contract. That is the last thing that I remember having been discussed at the Board of Directors.

Q. Now following that was there a discussion at the Executive Committee about whether the company should or should not buy the sprinkling system contract?

A. In January, 1943, there was a lot of discussion about that.

Q. Was that the first time it was discussed?

A. That was the first time that we had something concrete that we could do.

Q. Was it the first time it was discussed?

A. At the Executive Committee?

Q. Yes. A. Yes.

Q. And was that the occasion that lasted three days?

A. Well, that's my recollection; that it was that way, sir.

Q. And did you write minutes up of that meeting?

A. The minutes of the final meeting, in which the action was taken, were written up. The two previous discussions on the thing were not written up.

(Testimony of Alfred Arthur Newton)

Mr. Cobb: May I see the minutes on that, Mr. Davis?

Q. Now what date did you say the discussion started, on or about January—[408]

A. I didn't say what date. You have got the minutes there. I said—

Q. Do you recall?

A. I say that the discussions began the day before the date of those minutes there.

Q. If the minutes are dated January 14th, is it your answer that they started on January 13th?

A. That would be it unless that happens to be a Monday, in which case it was the Saturday before.

Q. And did the discussion then last to January 15th?

A. Well, I discussed the matter again after Carleton hadn't been—you see, he wasn't present at that meeting.

Q. Did you have a meeting and discussion on January 15th?

A. A meeting and discussion on January 15th?

Q. Yes.

A. No, I saw Carleton and discussed with him whether he wouldn't vote—I think it was the 15th I discussed it with Carleton. It only takes two members to make a meeting.

Q. Whom did you discuss it with on the 13th?

A. My recollection is everybody that was present on the 13th.

Q. Then you discussed it for how long at that time?

A. My recollection is that we were going into the pros and cons of the situation for about an hour.

Q. And Mr. John Harrah and Mr. Kinney thought that it was better to use the money to pay taxes against

(Testimony of Alfred Arthur Newton)

the real [409] property than to spend the money to buy this conditional sales contract? Was that their position then?

A. That was one of their lines of argument, yes, sir.

Q. Your line of argument was that as a stockholder you would rather see the contract purchased?

A. My line of argument was this, Mr. Cobb: That we could save about \$127,000 for \$10,000, and that it was worth taking a risk; that at the most if we didn't pay our taxes we would be subject to a six per cent penalty; that summer was coming and that in summer we always ran ahead of our actual expenses.

Q. This was in January, was it not?

A. That's right.

Q. And that is at the worst period of the amusement operations, during the month of January?

A. That is correct.

Q. And at that time the company was low on income and finances, was it not?

A. That was the period of the year in which it always has the least money.

Q. Well, it was true in 1943, was it not?

A. Yes, I don't recall the exact amount, although you can easily ascertain it. However, do you want to know on what I was counting to pay this? Is that what you want to know?

Q. I am not interested in that; I am interested in your answering the question. [410]

A. Will you state the question?

Mr. Cobb: Mr. Reporter, will you please read the question?

(Testimony of Alfred Arthur Newton)

(The reporter read the question.)

A. Yes, it was true in 1943.

Q. And Mr. Kinney was also a stockholder as well as a bondholder, was he not?

A. He was a stockholder, and now and then he had a bond.

Q. And he felt that it was better to pay taxes than it was to buy this contract?

A. That was his opinion.

Q. Did you have a conversation with Mr. Gerety following the middle of June, 1944?

A. Following the middle of June? Following the 13th of June?

Q. Yes. A. Yes, I did.

Q. And where did that conversation take place?

A. I don't remember just when it was. Our conversations used to take place in Eddie's office.

Q. Was anybody else present at that meeting?

A. Well, I don't remember—there was always people in and out of that office all of the time. During my discussion there was nobody else there.

Q. And what did you say and what did he say?

A. Well, let's see, the middle of June? I don't remember anything of importance having been said in the middle of June. [411] You see, I didn't learn about this sprinkler contract having been bought, which is what I think you are driving at, until several weeks after that.

Q. Did Mr. Gerety tell you about it?

A. I went down there one day after I had learned about it.

Q. Did he tell you about buying it?

(Testimony of Alfred Arthur Newton)

Mr. Davis: At what time?

Mr. Cobb: Any time.

The Witness: You mean to say did he say, "I bought the sprinkling system contract"?

Q. Did Mr. Gerety at any time tell you about buying an interest in the sprinkling system contract?

A. I asked him, "What is the deal about the sprinkling contract?"

Q. And what did he say?

A. And he said they were going to buy the contract and wanted me to come along with them.

Q. And what did you say?

A. I said, "Who are 'they'?"

Q. What did he say?

A. He says, "Charley Brown and some others."

Q. And what did you say?

A. I says, "Was Bill Harrah one of them?"

Q. And what else was said?

A. And he said he didn't know. [412]

Q. Well, didn't you ask Mr. Gerety at that time if he would sell a piece of the contract to you?

A. No.

Q. Are you sure of that? A. Sure.

Q. Did you at any time ever ask him that?

A. Whether he would sell me a piece of his share of the contract?

Q. Yes. A. No, I didn't.

Q. Did you say anything that would leave that impression, that if you could acquire a part of the contract—

A. That I could acquire a part of the contract from him?

(Testimony of Alfred Arthur Newton)

Q. Him or any one else?

A. I don't recollect any such statement.

Q. Do you remember a conversation along that line that left that import?

A. I told Mr. Gerety that I thought he should have let me know about the whole thing; that if I had known about it, it would all have been worked out on a different program.

Q. You told him that you would have been glad to go in with him, or words to that effect, did you not?

A. No, I told him we ought to work this thing out to get it for the company.

Q. And it is your positive testimony that you did not ask him if you could acquire an interest? [413]

Mr. Davis: Just a moment. I object to that on the ground that it has already been asked and answered.

The Referee: Sustained.

Mr. Cobb: Q. Well did you ask him how much he paid for his share?

A. Well, now, I don't remember that I did, Mr. Cobb.

Q. Well, did he tell you how much was paid for it?

A. He said he had a very small piece in it; and he didn't tell me how much was paid for it.

Q. Did he tell you how much Mr. Brown paid for it?

A. No.

Q. Now what else was discussed at this meeting?

A. With Mr. Gerety at that time?

Q. Yes.

A. Oh, we talked about the general condition of the rents; and he said the reason that he had bought the contract—do you want to go into that?

(Testimony of Alfred Arthur Newton)

Q. Just in regard to the sprinkler contract.

A. He said that he thought he ought to buy the contract so as to protect himself, and that I shouldn't blame him.

Q. Just prior to that, on May 3rd, you attended a Directors' meeting, or purported Directors' meeting, where they attempted to dissolve the Executive Committee?

A. That's right.

Q. And did they also pass a resolution discharging Mr. Gerety at that time? [414]

A. I don't recollect so.

Q. Following that meeting were you present when any one told Mr. Gerety or Mr. Brown that they were fired or discharged?

A. No, there was a great deal of discussion after that meeting as to whether that meeting had existed or not.

Q. But you remember some instructions being given by the Davises that Gerety was no longer general manager? A. I don't remember any such instructions.

Q. Did Mr. Gerety not tell you that was one of the reasons that prompted him to buy the sprinkler contract, was to protect himself from that action?

Mr. Davis: If your Honor please, I object to that question on the ground that it is incompetent, irrelevant, and immaterial.

The Referee: Overruled.

The Witness: Mr. Cobb, my recollection is that Mr. Gerety said that he thought if they got rid of the Executive Committee then he would be the next.

(Testimony of Alfred Arthur Newton)

Mr. Cobb: Q. And that he thought if he held the sprinkler contract he would have a little better position?

A. It would put him in a little better position.

Q. And you say you agreed with him on that?

A. I didn't say what I did on that.

Q. I thought you said a minute or two ago that you told him you agreed with him or something to that effect?

[415]

A. I don't know. You find out what I said, and I will see whether I said it.

Q. What else was said at this meeting?

A. Well, I expect if I thought about it long enough I could recollect the discussion of some of our tenants and some of the other discussions that went on around there.

Q. Just about the sprinkler contract.

A. I don't recollect anything else.

Mr. Cobb: I think that is all.

The Referee: Are there any other questions?

Mr. Davis: Yes, your Honor.

Redirect Examination

By Mr. Davis:

Q. Mr. Newton, in January of 1943 do you know of your own knowledge what indebtedness, if any, Mr. William Harrah and Margaret Schroeder owed to the Abbot Kinney Company?

Mr. Cobb: We object to that on the ground that it is incompetent, irrelevant, and immaterial; has no bearing on this case.

The Referee: I will hear you.

(Testimony of Alfred Arthur Newton)

Mr. Davis: At that time, as of January, 1943, the evidence will show that William Harrah, this very person whose father is the alter ego, so to speak, actually owed the company in excess of \$16,000; that—

Mr. Cobb: If we want to go into that lawsuit and that [416] problem—

The Referee: I will sustain the objection.

Q. Let me ask you this: You started to tell us, I think, how you proposed to finance the purchase of this contract in January, 1943, for the sum of \$10,000?

A. Yes, your Honor.

Q. How did you propose to do that?

A. Louis Halper owed the company and had agreed to pay in cash about \$4500. My recollection is that the company had something like \$6,000 in the bank and it had several collections that were out that I thought could be brought on and in addition to which John Harrah's son Bill Harrah owed the company some \$16,000. And altogether I thought it was ample—that there was ample money—and that if the worst came to the worst some of us directors who were the most interested could advance the company the small amount in addition to that to get the deal over.

Q. Was there any dispute about the Harrah account? Or was it an acknowledged indebtedness, if you know?

A. It was an acknowledged indebtedness, all right; but it was under process of settlement, your Honor. There was a question—at that time Mr. Harrah—I believe I speak correctly—had offered for his son to settle it for 18 bonds.

Q. What about the Halper obligation? Was that admitted or disputed? . . .

(Testimony of Alfred Arthur Newton)

A. That was disputed up to the time—he said that he [417] would give us so much cash if we accepted the \$4500. I am not saying exactly \$4500, but whatever amount it was.

Q. The company contended he owed more and he intimated he might settle for \$4500? A. Yes.

The Referee: Are there any further questions, gentlemen?

Recross Examination

By Mr. Cobb:

Q. How much did you owe on taxes at that time?

A. Now, Mr. Cobb, the question is how much we owed on taxes on the important pieces of property? Is that what you wanted to know?

Q. I am asking you how much they owed in taxes in January, 1943?

A. I suppose on the taxes we never intended to pay and haven't paid we probably owed about \$80,000.

Q. And this money that you were getting in was being used to meet your tax bills?

A. No, it was talked of that we would reduce certain tax bills that we had.

Q. This \$6,000 in cash you say the company had, was that used to pay on taxes?

A. I think that it wasn't. My recollection is that the company bought some bonds at a heavy discount with some of it and used the rest of it to pay taxes with, both of which, [418] as I recollect now, were considerable savings.

(Testimony of Alfred Arthur Newton)

Q. You knew on the first Monday in March you would have your personal property taxes to be paid down there, that would have to be paid in cash, did you not?

A. Yes.

Q. Do you know what that amounted to?

A. For that particular year?

Q. Yes. A. No.

Q. Approximately how much?

A. Well, it might have amounted to \$2,000. It might have amounted to more than that.

Q. Well, it would amount to more than that, as a matter of fact, would it not, Mr. Newton?

A. I dont know whether it would or not.

Q. You are not quite familiar—

A. I just don't remember something that happened two years ago on a tax matter.

Mr. Cobb: That is all.

The Referee: Are there any questions?

Mr. Kitzmiller: Just one question?

The Referee: Yes.

Recross-Examination

By Mr. Kitzmiller:

Q. Mr. Newton, do you remember in 1943, in January, [419] whether or not the Robbinses had been off the pier for several years prior thereto?

A. Yes—well now, wait a second. They still had their—still had their equipment in that Robbins Building, if that's what you mean.

(Testimony of Alfred Arthur Newton)

Q. Hadn't the matter of their lease on that Robbins Building been settled back in 1939?

A. It never had been paid. And if you will look on the thing, you will find that it wasn't settled finally until September of 1944.

Q. You are sure of that?

A. Well, it's just a matter of record.

Q. And that is the \$4500 you are talking about?

A. I don't say it was \$4500, but it was approximately. It was a nice sum of money.

Mr. Kitzmiller: That is all.

The Referee: Are there any other questions on your side, Mr. Davis?

Mr. Davis: I believe that is all.

The Referee: Step down. Call your next witness.

Mr. Davis: Mr. Newton may be excused. I think that is our case, your Honor.

The Referee: Who wants to go forward?

Mr. Cobb: At this time I will move to strike the testimony given by Mr. Halper in respect to a conference between Mr. Williams and Mr. John Harrah, where Mr. Brown was not [420] present and there is no—the only possible ground on which that could be admissible or binding would be on the ground that there was a conspiracy; and the petitioner having closed his case and no conspiracy having been established, I submit it is hearsay and—

The Referee: Why do you say no conspiracy has been established?

Mr. Cobb: Because there has been no evidence at all that there was any conspiracy between Mr. Harrah; and the evidence is undisputed that Mr. Harrah did not know that Mr. Gerety and Mr. Brown were going to negotiate for this contract until after it was already purchased. The evidence is undisputed that he told Mr. Brown that in his opinion he should not buy it because he would have a lot of trouble, like that the Cruickshank people had, in trying to collect, and that a deficiency was not good if the bonds were foreclosed; that it would probably cause a bond foreclosure if somebody bought the contract; and that there is not one word of evidence showing any joint plan, scheme, or design on behalf of Mr. Harrah with Mr. Gerety and Mr. Brown in acquiring this contract.

The Referee: The motion is denied.

Mr. Kitzmiller: I make the same motion in so far as Mr. Gerety is concerned, your Honor.

The Referee: The motion is denied.

Mr. Vernon: I would like also to make the same motion [421] in regard to my client, William Harrah.

The Referee: The motion is denied. Who wants to go forward?

Mr. Cobb: We will call Mr. Harrah, your Honor.

JOHN HARRAH,

called as a witness on behalf of the respondents, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Cobb:

Q. Mr. Harrah, did you have a conference with Mr. Williams and Mr. Halper at your office on or about the month of November on a Saturday afternoon in which they brought an agreement affecting the bonds to your office?

Mr. Davis: Just a moment. I object to that on the ground that no proper foundation has been laid as to the time.

The Referee: It is the best time they can lay.

Mr. Cobb: I asked him what time they had the meeting.

Mr. Davis: When?

Mr. Cobb: In November, 1944.

The Referee: Answer the question.

The Witness: November, 1944? No, I have no recollection whatever of having talked to Mr. Williams and Mr. Halper together or to Mr. Halper at all in November, 1944, except [422] in that stockholders' meeting.

Mr. Cobb: Q. It has been testified that Mr. Williams and Mr. Halper called at your office with a contract having to do with the bonds or re-leasing of the bonds or something of that character and you wanted to make certain changes and you agreed to take it and re-draft it, and that following that meeting a discussion was had pertaining to the sprinkler contract.

(Testimony of John Harrah)

Mr. Davis: Just a minute. I object on the ground that it is leading and suggestive. He is suggesting the whole problem, your Honor. Now let him—

The Referee: I think it is all right. Overruled.

Q. Does that refresh your recollection, Mr. Harrah?

Mr. Davis: Might I interpose another objection, on the ground that it is assuming facts not in evidence? As a matter of fact, Mr. Halper testified that he and Mr. Williams presented to Mr. Harrah a consent to the election on the Board of Directors of Mr. Frank Williams and Mr. Philip Davis and it was as a result of that discussion that this other discussion developed.

Mr. Cobb: Thank you, I believe your memory is better than mine. I couldn't quite identify the agreement.

The Referee: We have not as yet gotten the witness to recollect any occasion.

Mr. Davis: He could not recollect this one, because I am sure it did not take place. [423]

The Referee: Q. Mr. Harrah, we are trying to find out about a conversation which you are said to have had on a Saturday afternoon and in the course of which conversation you examined a document and did not approve of the language and in your handwriting you made some interlineations and you said, "I will take this and have it re-drafted." Do you remember such an occasion?

A. I remember Frank Williams bringing in such an instrument one time.

The Referee: Go ahead. Maybe you can develop it from there.

Mr. Cobb: Q. About when was that, Mr. Harrah?

A. Oh, I think it was about March or April, 1944.

(Testimony of John Harrah)

The Referee: Q. This is after the famous \$30,000, about what time?

Mr. Davis: No, your Honor, after the \$7500. It was before the \$30,000. He so testified.

The Witness: No, that was brought in in March or April. That was before they called that Directors' meeting where they didn't get a quorum. That's when that was brought in. I remember that. Frank Williams brought it in and handed it to me.

Mr. Cobb: Do you remember having any meeting, where Mr. Williams and Mr. Halper were present, during the month of November, 1944?

A. I don't remember—in fact, I feel right at the [424] moment positive that I didn't have any meeting with either one of them in the month of November, 1944, except at the stockholders' meeting that had been called and held on November 8th, I believe.

Q. Did you ever have any meeting with Mr. Williams during the month of November, 1944?

A. No, I didn't have any meeting with him.

Q. Did you during the month of October of 1944 have any meeting with Mr. Williams or Mr. Williams and Mr. Halper?

A. No, I only remember one meeting I had with Mr. Williams and Mr. Halper—I think I had only one meeting with them; and that was about—late in June, 1944.

Q. Well, at the meeting that was held in June did you have any discussion with them about the sprinkler contract? A. Yes, I did.

Q. And who was present at that meeting?

A. Frank Williams and Lou Halper.

(Testimony of John Harrah)

Q. And what was said by you and what was said by them on that occasion?

A. Well, they came into the office there in the liquor store; and Lou said that Frank had told him that Eddie Gerety and Charley Brown bought the sprinkler contract. I said yes, they had. I said they had been paid \$7500 on it. That is my recollection, that it was just after that \$7500 was paid that they came in.

So Lou said, "I am sorry about that." [425]

And I remember distinctly what Frank said. He said some obscene language to the effect that he blamed Lou for not buying it. And he asked him, he said, "Why didn't you buy?"

Lou said, "Well, I didn't seem to be able to work out a deal with Hugh Darling."

And Frank asked me if I had any part of it and I said, "No, I have no interest in it at all."

And the conversation continued—I can't always remember who spoke, I mean whether it was Lou Halper or Frank Williams; but they asked me if I knew what they paid for it. And I said, "They say they paid \$15,000."

And they asked how much Eddie had in it. And I said, "He says he has a third."

They said, "Where did Eddie get \$5,000?"

I said, "I don't know. It wasn't any surprise to me he would have \$5,000."

They said, "Where did Charley Brown get \$10,000?"

I said, "I don't know that either, but I am not surprised that he had \$10,000."

(Testimony of John Harrah)

So they then started in a discussion about what they could do with it; and I said, "Well, as far as I know, they can do whatever anybody else could do with it. We talked that over before, when we were talking about buying it. So they can sue on it or they can wait on it; or they can probably turn the water off, take the sprinkler system out, and then sue the company. There are several things they can do." [426]

They said, "What are they going to do?"

I said, "I don't know any more than what we have done so far. We have paid them \$7500, and we have got an agreement they won't turn the water off for three months."

So Lou says, "Well, it should be possible to work a deal out with Eddie, because all Eddie is really interested in is keeping his job." He says, "I don't like that. I don't want him in there. And," he says, "Frank don't want him in there either."

So then about that time Lou said to Frank, "I'd like to talk to John a little bit. Do you mind waiting for me outside?"

Frank went out; and Lou said, "You know, Frank wants to be manager over there." He said, "He don't know enough to run a peanut wagon; but he has sold all his horses and his wife won't let him stay around the house and he don't know what to do with himself. So," he said, "why not make—there has got to be a scapegoat. Why not make him the scapegoat and put him in there? He will run it as we tell him."

Lou, speaking for himself, said I understood construction and I could say—give advice in the way of con-

(Testimony of John Harrah)

struction and repair; and he said I was versed on what the rental should be, the amount to be collected and things like that. "So," he said, "we shouldn't have any trouble with him."

So I said, "Well, I am not certain that it would work out that way, because it seems to me that you are working pretty [427] well with the Davis group at present and you did not say anything to me or confer with me at all about that Directors' meeting you tried to hold, didn't even tell me you intended to hold one." I says, "I am not so sure about that. But," I says, "I don't care so much about that. But if Eddie is put out of there, he has," I says, "about \$20,000 in bonds and he has his interest in the High Ride and in the Penny Arcade. And some fair offer should be made to him to give him a chance to sell out if you are going to take his job away from him."

Lou said he felt that way himself, and that he would talk to Frank about it. And he says, "I will see you again soon" or "I will call you up and we will get together again."

And that was practically the conversation.

Q. Was anything said about Williams or Halper's acquiring an interest in the contract or acquiring the contract from Brown or Gerety?

A. No, there wasn't; nothing said.

Q. In this conversation did you state to him that "We"—referring to you and somebody else—"have bought the sprinkler contract"?

A. No, no. I said just what I related I said. Frank Williams asked me what part I had of it. Or he might have said, "What part has Bill Harrah got of it?"

(Testimony of John Harrah)

And I said, "None. The only deal he had was the deal with you, the one he was trying to make and didn't make." [428]

Mr. Cobb: That is all I have.

The Referee: Are there any other questions over here? Any cross examination?

Mr. Davis: No questions.

The Referee: Step down. Call your next witness.

(A short recess.)

The Referee: Ready, gentlemen?

Mr. Cobb: Mr. Brown, come forward, please.

CHARLES J. BROWN,

called as a witness on behalf of the respondents, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Cobb:

Q. Mr. Brown, have you secured from the bank or your files a copy of your bank statement from May 2, 1944, through June? I show you what purports to be a statement of the Security-First National Bank of Los Angeles and ask you if that is a bank statement received from the bank pertaining to your account for the month of May and June, 1944? A. It is.

Q. I call your attention to a withdrawal on January 13, 1944, of \$5,000.

A. You mean June, do you not?

Q. I mean June, 1944. Is that the \$5,000 that you [429] testified to in respect to a cashier's check?

A. It is.

(Testimony of Charles J. Brown)

Mr. Cobb: I desire to offer this bank statement.

The Referee: All right, Brown's Exhibit 1.

Mr. Cobb: Q. Now I show you a check, a counter-check on the Security-First National Bank, dated March 2, 1944, in the amount of \$3500 and ask you if that is your signature? A. It is.

Q. And was that a check used in connection with the acquisition of a cashier's check?

A. It was indirectly.

Q. Will you state the transaction in reference to the \$3500?

A. About that time, January, February, March, I contemplated buying a house.

Mr. Davis: If your Honor please, I object on the ground that it is incompetent, irrelevant, and immaterial.

Mr. Cobb: I can tie it up. I have here—the bank, at Mr. Brown's request, have given me a letter in which they show what their records indicate in respect to his entries into the safe deposit box and also in respect to cashier's checks that were issued by them to him. It is for the purpose of tying that in.

Q. Mr. Brown, did you secure from the bank a statement in respect to cashier's checks purchased by you and also the times that you entered your safe deposit box in the year 1944? [430] A. I did.

Q. And is this the letter that you received?

A. It is, under the signature of the bank.

Q. Mr. Coe is the assistant manager of the bank?

A. Yes.

Mr. Cobb: I desire to offer this as Mr. Brown's exhibit next in order.

(Testimony of Charles J. Brown)

The Referee: Brown's Exhibit 2.

Mr. Cobb: Q. Exhibit 2 refers to a cashier's check in the amount of \$3800. I will ask you whether this countercheck of \$3500 was used to acquire the cashier's checks of that date?

A. I used this \$3500 and \$300 cash, and I bought a cashier's check for \$3800 on the third month, the second day, 1944.

Q. You later cashed the \$3800 cashier's check?

A. On June 6th.

Q. What did you do with the money?

A. I put it in my safe.

Mr. Cobb: I offer this countercheck as exhibit next in order.

The Referee: Brown's Exhibit 3.

Mr. Cobb: Q. Mr. Brown, I show you what purports to be a receipt signed by Mr. Hugh Darling and also by yourself pertaining to the sprinkler contract and ask you if you received this and was it executed by the parties on or about [431] the date that it bears, to-wit, June 13, 1944? A. It was.

Mr. Cobb: I desire to offer this as Brown's exhibit next in order.

The Referee: All right, Brown's Exhibit 4.

Mr. Cobb: Q. Mr. Brown, you testified the first day that there were two cashier's checks in the amount of \$5,000. Were you in error about that?

A. I was.

(Testimony of Charles J. Brown)

Q. And will you state what amounts the cashier's checks were for?

A. Why, I bought—I went in the bank and I bought a check for \$5,000. And I had promised to meet Eddie Gerety there. So after I went there and bought that check, why, he wasn't there; and I went on out to my safe and got the money and I came back and went into the safe deposit box and took out the balance; and I was there waiting for him to come in.

When he came in, he had a thousand dollars; and he says—I was just there at the window, going to buy my check for \$5,000—he says, "Here is a thousand dollars. You don't want to carry this to town. You might as well buy the check for \$6,000."

I wish to state at this time that when I was in the room that I hadn't seen Eddie Gerety prior to ever being served by this—

Mr. Davis: Just a moment. I object to any gratuitous [432] statement.

The Referee: It may go out.

Mr. Cobb: Q. That was the correction you thought of, after you had had time to think about it, that you wanted to express the first day? A. Yes.

Q. You came then into Los Angeles, and Mr. Gerety bought a cashier's check in Los Angeles?

A. That's right, we came down over here and we parked; and we went over to the International Branch, I guess, and bought a check for \$1500.

Q. Then from there you went to Mr. Darling's office? A. We went to Mr. Darling's office.

(Testimony of Charles J. Brown)

Mr. Cobb: You may cross examine.

The Referee: Any questions?

Mr. Davis: No questions.

Cross-Examination

By Mr. Vernon:

Q. On November 25, 1944, did you sell a part interest in the sprinkler contract to Mr. William Harrah?

A. I sold him a half of my balance of the two-thirds interest in the contract.

Q. That would be a one-third interest altogether?

A. Of the balance.

Q. You sold him one-third of the balance, or one-half of [433] your interest?

A. One-half of my interest, one-third of the total amount due.

Q. Did he pay you for that? A. He did.

Q. What did he pay you? A. \$3,000.

Mr. Vernon: That is all.

The Referee: Are there any other questions? All right, step down. Call your next witness.

Mr. Kitzmiller: Mr. Gerety.

The Referee: Who is calling Mr. Gerety?

Mr. Kitzmiller: I am calling him.

The Referee: Be seated, Mr. Gerety, please. You have been sworn.

EDWARD A. GERETY,

called as a witness on behalf of the respondents, having previously been duly sworn, testified as follows:

Direct Examination

By Mr. Kitzmiller:

Q. You heard Mr. Newton's testimony with regard to a conversation that occurred with you some time shortly after June 13, 1945? A. That's correct. [434]

Mr. Davis: Just a moment. For the purpose of the record I think that you are in error. It was 1944, was it not?

The Witness: 1944, yes. Pardon me.

Mr. Kitzmiller: Q. When did that conversation take place?

A. It was just a few days after we purchased the contract, Mr. Brown and I; and I told him that we had purchased the Cruickshank contract. And of course he asked me what I was going to do with it. And I told him that I was going to collect some money on it when it came time. In the meantime—before that he had asked me if I would sell him a piece of it—by "a piece of it" I mean a part of it. I told him no, that I wasn't interested in anything like that. And so then the other conversation went on there, that he wanted—

Q. Did Mr. Newton in that conversation make any statement to you that you had no right to buy the contract? A. He did not.

Q. I believe you stated, when you were called on cross examination yesterday, that you had talked to Mr. Williams, Mr. Harrah, Mr. Halper, Mr. Carleton Kinney, and they all knew that you at one time or another, up to,

(Testimony of Edward A. Gerety)

we will say, November, 1944—those particular people knew that you had purchased the contract and you had had conversations with them?

A. They knew that I purchased it. I never did talk to Mr. Halper.

Q. You never did talk to Mr. Halper? [435]

A. But I did to the others.

Q. Did any of the other directors ever at any time inform you that you should have purchased the contract for the corporation? A. They did not.

Q. The only matter—or the only time that any such thing occurred was here several months ago, when you received a letter from Mr. Davis?

A. Yes, I received a letter from Mr. Davis.

Q. You heard Mr. Newton testify that on June 6th—or at least he believed it was June 6th; anyway it was a Tuesday around June 6th—he came to you and had a conversation with you in which he requested you to use your influence to have Mr. Harrah buy the contract for the company?

A. There was never any conversation like that between Mr. Newton and myself.

Q. Now, Mr. Gerety, with regard to the duties that you had with the Abbot Kinney Company, did you have any control of the funds of the Abbot Kinney Company?

A. I did not.

Q. And I am speaking now of the year 1944.

Mr. Davis: Just a moment, please. I move that be stricken for the purposes of objection, your Honor.

The Referee: It may go out.

(Testimony of Edward A. Gerety)

Mr. Davis: I object on the ground that it is indefinite as to what is meant by "control," as to whether he had the [436] right to collect the moneys, had the right to endorse the checks, draw checks—

The Referee: Sustained.

Mr. Kitzmiller: Well, I will go over each one of those, then.

Q. Did you have the right to draw checks on the bank account by yourself? A. I did not.

Q. Did you collect the moneys of the corporation during that year? A. No.

Q. Did you endorse checks?

A. No, they were endorsed by stamp, "For deposit" in the bank only.

Q. Did you ever do that? A. No, I never did.

Q. Who did that?

A. The bookkeeper or the cashier.

Q. Did you have the right to compromise any obligations against the company?

A. No, except—if I took it up with the Executive Committee first.

Q. And then only after— A. The approval.

Q. Did you have the right to employ attorneys for the company? [437] A. No.

Mr. Davis: Just a moment, your Honor.

The Referee: Haven't we gone over all this?

Mr. Davis: Yes, I object on the ground that it has been asked and answered, and that—

Mr. Kitzmiller: Not with Gerety, your Honor.

Mr. Davis: Yes, with Mr. Gerety.

The Referee: Or was it with Mr. Harrah?

(Testimony of Edward A. Gerety)

Mr. Davis: I object on the further ground that it is calling for the conclusion of the witness, what his rights were. He might ask him whether he ever did certain things.

Mr. Kitzmiller: It is immaterial to me how I frame the question.

The Referee: All right, the objection is overruled. Let me see what he claims his rights were. Go ahead.

Mr. Kitzmiller: Q. Did you ever loan any of the moneys of the corporation?

A. No, I did not; no, I didn't.

Q. Did you ever borrow any money for the corporation? A. I did not.

Q. Did you ever pledge any of the assets of the corporation? A. I did not.

Q. Did you ever sell any of the property of the corporation?

A. I couldn't sell it; it's a corporation. [438]

Q. Now with regard to, we will say, any accounts, rent accounts, that might be owed to the corporation, did you have the right to, did you ever, compromise the amount of any rent account?

A. No, I had no authority to do that. I would have to get permission from the Committee.

Q. Outside of ordinarily monthly, current bills, did you have any authority to enter into contracts for the corporation? A. No, I did not.

Q. Did you ever enter into any such contract?

A. I did not.

Q. With regard to any of the duties that you had, and I believe you yourself did testify something on cross

(Testimony of Edward A. Gerety)

examination with regard to employing certain individuals, what action, if any, could you take for and on behalf of the corporation without the approval of the Board of Directors, excluding any action in connection with the repairing and maintenance of the properties of the corporation?

A. You mean employees that were—read that again, please.

The Referee: Read the question, please, Mr. Reporter.

(The reporter read the question.)

Mr. Kitzmiller: Q. Excluding any action with regard to employees and any action you could take with regard to the repair and maintenance of the pier, what else could you do, [439] if anything, with regard to the corporate business without the consent of the Executive Committee? A. Nothing that I recall I could do.

Q. Now there was a statement made here a short while ago that Mr. Williams wanted to know where you got \$5,000. Calling your attention to June, 1944, approximately how much were you worth in liquid assets?

A. Well, including the Kinney bonds, I would be worth between maybe thirty and thirty-five thousand dollars.

The Referee: Q. Witness, counsel said "liquid."

A. I can sell those.

Q. For par? A. No, they wouldn't have to be—

Q. You mean for what you could sell them for; is that right? A. Yes.

Q. You would be worth about how much in liquid assets? A. About \$30,000.

(Testimony of Edward A. Gerety)

The Referee: About \$30,000. All right.

Mr. Kitzmiller: Q. Did you ever at any time offer to sell Mr. John Harrah or any one else your one-third interest in that sprinkling system contract?

A. I did not.

Q. Did any one, including Mr. John Harrah, ever have any right to negotiate for the disposition of your one-third interest in that sprinkler contract? [440]

A. They did not.

Mr. Kitzmiller: That is all, your Honor.

The Referee: Q. Mr. Gerety? A. Yes.

Q. Do you recall when you received your \$2500 from the first payment of the \$7500 which was made on the contract?

A. It was some time after it was paid, your Honor.

Q. Do you know when it was?

A. No, I don't know for sure. I know it was a check.

Q. Do you know how much time elapsed, Mr. Gerety? The check, it appears, was dated June 23rd; was credited, apparently credited, on Mr. Brown's bank account at the Security Bank on June 26th though the perforation stamp is June 27th. Do you know how long after that you got— A. It was after that.

Q. Do you know how long? Was it days, weeks, or months?

A. It might have been a couple of weeks or ten days. I am not sure.

Q. Why did that time elapse? A. Why?

(Testimony of Edward A. Gerety)

Q. Yes.

A. I guess I just didn't see Mr. Brown to go get the money.

Q. Wait, some of you Venice people have testified you can't walk out on the street without running into everybody you know. [441]

A. Yes, but to get the check—it was maybe days, your Honor.

Q. What was Mr. Brown's business at that time?

A. He was running the Tango game or the Bridgo game.

Q. At what part of the pier?

A. Right at the head of the pier, the Robbins Building.

Q. The Bridgo game? A. Yes.

Q. Any other concession?

A. And he had the Slide.

Q. Which is that? A. The Bamboo Slide.

Q. On the left-hand side of the pier as you go out?

A. That is correct.

Q. He was not on the company's payroll at that time?

A. No, he was through after that meeting in May.

Q. How long before this contract purchase did Mr. Brown go off the company payroll?

A. He went off the day that they had the meeting there, the first meeting in May, that they didn't have the quorum.

Q. There was no meeting—

Mr. Cobb: They claim there was and tried to fire everybody. Mr. Brown took them at their word.

(Testimony of Edward A. Gerety)

Mr. Davis: That is not so.

The Witness: I did some research the next day; so I advised them that they hadn't properly— [442]

The Referee: Very well. Any questions?

Mr. Davis: If you would like to go through these leases, it is perfectly all right. These are all leases that have been executed, renewals by Mr. Gerety.

The Referee: Mr. Davis, assuming that they are signed by Mr. Gerety, how would that prove he exercised any authority in making the lease?

Mr. Davis: Other than that the agreement itself shows that he was the one that signed them—

Mr. Kitzmiller: We will stipulate he signed lots of them.

The Referee: That doesn't show he did it of his own volition. He could have discussed it with the Executive Committee, and the Executive Committee could have said, "Go ahead and make the lease."

Mr. Davis: Your Honor, I would like to introduce these. If there is any question in your Honor's mind as to Mr. Gerety and his authority and his fiduciary relationship, we will go through all these leases and we will go through every meeting of the Executive Committee and show that these were not discussed at all at the Executive Committee meeting.

The Referee: I cannot tell you what my conclusion is going to be until after the case is closed. You put in whatever evidence you think is necessary to support your position.

Mr. Davis: Just let me introduce a few for the purpose of the record, and we will limit it to that. [443]

(Testimony of Edward A. Gerety)

Cross-Examination

By Mr. Davis:

Q. I call your attention, Mr. Gerety, to a letter dated June 10, 1943, directed to Robert Murphy—

A. That is correct.

Q. —in which you state:

“Dear Sir:

“This is to advise you that your lease on Booth 29, Venice Pier, has been extended one year to April 1, 1944.

“The rental is to be \$35 per month for January, February, March, April, September, October, December and \$50 per month for the month of May and \$90 per month for June, July, and August. All other terms and conditions are to remain the same as in the original lease.

“If this is satisfactory to you, kindly sign the enclosed copy of this letter and return it to us for execution, after which we will return one copy to you for your record.”

Did you send that letter? A. I did.

Q. Is that your signature?

A. Right there, yes, sir.

Mr. Davis: E. A. Gerety. All right.

Your Honor, I don't want to introduce these, because these [444] are our original—

Mr. Cobb: Their own witnesses testified that Mr. Gerety was authorized by the Executive Committee to handle the execution of these leases, and that if there weren't officers around he would sign them.

The Referee: Are there any other witnesses?

Mr. Davis: No other witnesses.

Mr. Cobb: I wanted to offer a portion of the answer that has been filed in this proceeding in connection with the answer to the involuntary petition, the corporation's amended answer, filed with this Court on July 20, 1945, wherein the corporation asserts that "In respect to the said"—I will read it:

"Respondent further admits that the petitioners own certain of the bonds aforesaid, but is without information or belief as to the total amount owned by said individuals, and its denial of the amount of the bonds owned by them is measured based on that ground. In respect to said alleged indebtedness of said petitioning creditors, respondent alleges that any alleged indebtedness owing to said petitioners, or any of them, is barred by the sections of the Code of Civil Procedure of the State of California pertaining to limitations prescribed for the commencement of actions, and particularly is barred by the provisions of Subdivisions (1) and (2) of Section [445] 336-A of the said Code of Civil Procedure of the State of California."

May that evidence be received by reference, your Honor?

The Referee: You have read it into the record, have you not?

Mr. Davis: I object, your Honor, on the ground that it is incompetent, irrelevant, immaterial, and has no bearing on this proceedings and is not properly a part of the record.

The Referee: Overruled.

Mr. Cobb: I further want to offer by reference, rather than reading it, the quotations taken from the Trust Indenture contained on page 65, being Section 1 of Article 11, truly copied and set forth in the petition in in-

tervention filed on July 19, 1945, in this matter. In order not to have to read it, if the reporter may copy the two and a half pages that pertain to those sections—

Mr. Davis: I object on the ground that it is incompetent, irrelevant, and immaterial, and has no bearing upon the issues in this case.

Mr. Cobb: That indenture provides generally, without going into it, that any action is vested in the Trustee; that under the Trust Indenture no bondholder has the right to take any action to enforce his obligation against the company. It must be taken by the Trustee on behalf of all bondholders.

Mr. Grainger: That covers the same thing we had in the argument before Judge Dickson. Of course there are other [446] portions of that Indenture which state that that has no application where there is a question on the matter of fraud, and so forth.

The Referee: The objection is overruled. It may go in. You have definitely designated now what it is? First give us the caption of the instrument.

Mr. Cobb: The caption of the instrument is: "In the Matter of Abbot Kinney Company, a California Corporation, Alleged Bankrupt, Petition in Intervention in Opposition to Amended Involuntary Petition on file here."

The Referee: Filed when?

Mr. Cobb: July 19, 1945. And the portion that I desire to offer is Paragraph X of the said petition in intervention.

The Referee: On page what?

Mr. Cobb: On page four, commencing on page four and ending on page six.

The Referee: All right, if the record has to be made up the reporter will include it.

"X

"That the Trust Indenture securing said bonds provides on page 65, Section 1, Article 11:

"All rights of action on or because of the bonds issued hereunder or the interest coupons thereto appertaining and all rights of action under this Indenture are hereby expressly declared to be vested exclusively in the Trustee, except only as hereinafter provided; [447] and such rights may be enforced by the Trustee without the possession of any of the bonds issued hereunder or the interest coupons thereto pertaining. Any suit or proceeding instituted for the Trustee shall be brought in its name as Trustee, and any recovery or judgment shall be for the prorata benefit of the bonds issued hereunder and the interest coupons thereto appertaining.

"Section II: Any requesting direction, resolution or other instrument required by this Indenture to be signed and executed by bondholders may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by attorney or agent appointed in writing. Proof of the execution of any such request, direction, resolution or other instruments, or of the writing appointing any such attorney or agent, and of the ownership of bonds, if made in the following manner, shall be sufficient for any purposes of this Indenture and shall be conclusive in favor of the Trustee with regard to due action taken by it under such request.

"Section III: No holder of any bond or coupon secured hereby shall have the right to institute any suit,

action or proceeding at law or in equity, upon or in respect of this Indenture or for the execution [448] of any trust or power hereof or for the appointment of a receiver or for any other remedy under or upon this Indenture, unless such holder shall previously have given to the Trustee written notice of an event of default, and unless also the holders of twenty-five (25%) percent in amount of the bonds secured hereby then outstanding shall have made written request upon the Trustee and shall have afforded to it a reasonable opportunity either to proceed itself to exercise the power hereinbefore granted, or to institute such action, suit or proceeding in itself or may, and unless also such holders shall have offered to the Trustee reasonable security and indemnity against costs, expenses and liabilities to be incurred in or by reason of such action, suit or proceeding; and the Trustee shall have refused or neglected to comply with such request within a reasonable time thereafter. Such modification, request and offer of indemnity are hereby declared in every such case at the option of the Trustee to be conditions precedent to the execution of the actions and trust of this Indenture and to any action or cause of action for foreclosure or for any other remedy hereunder. It is understood, intended and hereby provided that no one or more holders of bonds or coupons shall have any right in any manner whatever [449] to affect, disturb or prejudice the lien of this Indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings hereunder shall be instituted, had and maintained in the manner herein provided for the equal benefit of all holders of such outstanding bonds and coupons."

The Referee: Is there anything else, Mr. Cobb?

Mr. Cobb: In connection with this proceeding, I would like to offer the amended and voluntary petition as part of the record here unless it is.

The Referee: You will have to offer it. The amended involuntary petition?

Mr. Cobb: Yes, your Honor.

The Referee: All right, that will be deemed to be a part of the record; and the reporter will take note of it.

"In the Matter of ABBOT KINNEY COMPANY, a California Corporation, Alleged Bankrupt,

In Bankruptcy

No. 43-551-O'C

FIRST AMENDED INVOLUNTARY PETITION.

"To the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, for the Southern District of California:

"The first amended petition of Frank Williams, Moses C. Davis and Charles W. Cradick, respectfully shows:
[450]

"1. That Abbot Kinney Company is a corporation organized and existing under the laws of the State of California and that it is a business corporation and is not a municipal, railway, insurance or banking corporation, or a building and loan association.

"2. That the said Abbot Kinney Company has for more than 25 years next preceding the date of the filing of the original Involuntary Petition in the above-entitled matter, had its principal place of business at the

Venice Pier in the City of Los Angeles, County of Los Angeles, State of California, in said district.

"3. That the said Abbot Kinney Company owes debts in excess of \$100,000 and is insolvent and is not a wage earner or farmer.

"4. That each of the petitioners are creditors of said Abbot Kinney Company, each having a provable general unsecured claim against Abbot Kinney Company fixed as to liability and liquidated in amount, which, in the aggregate, amounts to more than \$500 over and above the value of securities held by each of them.

"5. That the nature and amount of your petitioners' claim and the securities held by them, are as follows: That on the first day of April, 1931, Abbot Kinney Company issued its Trust Indenture, securing an authorized issue of \$350,000 First Mortgage 7% [451] Sinking Fund Gold Bonds, which Gold Bonds, under the terms of said Trust Indenture, were due April 1, 1944. That there is presently outstanding and unpaid, \$269,000 principal amount of said bonds. That there is presently due in interest on said outstanding bonds, a sum in excess of \$225,000. That the Abbot Kinney Company also owes taxes which are liens against the property securing said unpaid bonds, in a sum in excess of \$75,000. That the total reasonable market value of all of the assets of Abbot Kinney Company securing the payment of said outstanding bonds, is less than \$400,000. That the assets of Abbot Kinney Company securing said unpaid bonds, have a value of at least \$100,000 less than the total amount of principal and interest presently due on said bonds. That your petitioner Frank Williams owns more than \$75,000 of the face amount of said unpaid bonds

and your petitioners, Moses C. Davis and Charles W. Cradick, each own not less than \$1,000 of the face amount of said unpaid bonds. That your petitioners do not waive the security for said bonds.

"6. That within 4 months preceding the filing of the original involuntary petition in the above entitled matter, viz., on the 23rd day of June, 1944, the said Abbot Kinney Company, while insolvent, committed an act of bankruptcy in that it did pay out of [452] its assets, to Charles Brown, Ed. Gerety and so plaintiff is informed and believes and upon that ground alleges, to William Harrah and John Harrah, the sum of \$7500 on an antecedent debt due them by Abbot Kinney Company, which payment was made for the purpose and with the intent of preferring said Charles Brown, Ed. Gerety, William Harrah and John Harrah, over the other creditors of said Abbot Kinney Company.

"Wherefore, your petitioners pray that service of this petition, with the subpoena, may be made upon Abbot Kinney Company, as provided by said bankruptcy law of 1898 as amended, and that it may be adjudged bankrupt within the purview of such law.

(Signed) FRANK WILLIAMS
MOSES C. DAVIS
CHARLES W. CRADICK
Petitioners

NICHOLAS & DAVIS

By M. Philip Davis

Attorneys for Petitioners

State of California
County of Los Angeles—ss.

“Frank Williams, Moses C. Davis and Charles W. Cradick, the Petitioners above named, do hereby make [453] solemn oath that the statements contained in the foregoing amended petition, subscribed by them, are true.

(Signed) FRANK WILLIAMS
MOSES C. DAVIS
CHARLES W. CRADICK

Subscribed and sworn to before me this 28th day of February, 1945.

(Notarial Seal) GRACE B. HUNTLEY,
Notary Public in and for the County of Los Angeles,
State of California.”

(The foregoing Creditors' First Amended Involuntary Petition bears file mark:

“Filed Feb. 28, 1945, at 45 min. past 2:00 o'clock p. m.

HUGH L. DICKSON, Referee,
J. B., Clerk.”)

The Referee: Is there anything else, gentlemen?

Mr. Cobb: I don't believe there is anything further from Mr. Brown.

The Referee: Do any of you other gentlemen have anything on the side of the defense?

Mr. Kitzmiller: No, your Honor. [454]

The Referee: Do you stipulate, Mr. Davis—

Mr. Davis: That is all, your Honor. Mr. Grainger thinks that—

Mr. Grainger: If your Honor please?

The Referee: Yes.

Mr. Grainger: We wish also to read into the record from page 96 of the Trust Indenture the following—

Mr. Cobb: There isn't any page 96 in the Indenture, but perhaps in your copy—

The Referee: Doesn't it have an article or paragraph number?

Mr. Grainger: Do you have the original there, Mr. Cobb?

Mr. Cobb: I have a copy of—

Mr. Kitzmiller: How does it start? Maybe I have a copy.

Mr. Grainger: It is contained in Article—

Mr. Kitzmiller: I have a page 96, Mr. Cobb. If you will—

Mr. Grainger: Line 18.

Mr. Kitzmiller: "Provided, however"?

Mr. Grainger: "Provided, however, that nothing contained herein shall defeat the right of an individual bondholder to pursue his legal right of equitable remedy where his right of action arises out of collusion, fraud, wilful negligence, or gross misconduct."

Mr. Cobb: I think we would have to tie that in further. That refers to the Trustee not acting in—

Mr. Grainger: That refers to the rights of the bondholders. [455] Personally I don't think any of that is material. But if one goes in, I think this should.

Mr. Cobb: I won't have anything in addition myself.

The Referee: Is there anything else, gentlemen? Are you all through? All finished? The case stands submitted, subject to argument?

Mr. Davis: Yes, your Honor.

The Referee: The argument will be made first by the respondents. Who wants to be heard? The question first is: Is Mr. Gerety in a confidential or fiduciary relationship, or was he, to the Abbot Kinney Company at the time of the purchase of the sprinkler contract? That is question number one.

Question number two, who were the real moving parties in the purchase of the sprinkler contract? Were they simply, as contended here, Mr. Brown, with Mr. Gerety holding on the record a secret one-third interest; or were the real moving parties Mr. John Harrah, Mr. Brown, and Mr. Gerety? Now in connection with Mr. Harrah it may be that if he was a party at all he acted not for himself but for his son William Harrah. So I want to hear from the respondents on those two questions. And I will hear them on any other question that they think should be argued.

Mr. Cobb: I think the petitioners here should set up what they claim of the interests of Mr. Brown are invalid. You can't tell whether they claim the whole contract is [456] invalid or whether they claim that he holds as Trustee for them. It is just a shot-gun affair. Part of their request for relief is inconsistent.

The Referee: In what way?

Mr. Cobb: In other words, they admit the validity of the conditional sales contract; but they claim that the conditional sales contract is not a valid conditional sales contract. And if it should be so adjudged, that is inconsistent in claiming there is a trust. Third—

Mr. Grainger: Where do we claim that?

The Referee: Well, the prayer is that the alleged bankrupt is the owner of the sprinkler system and the contract is free of any claim of said parties or any of them. I don't know how you can possibly go that far, that the bankrupt is the owner of the contract. What do you mean, that they have part of the obligations under the contract or what?

Mr. Grainger: The thought first, if your Honor please, is that we claim of course that they hold as involuntary trustees. Of course then, upon that coming into the hands of the alleged bankrupt, the one who owes the money, there would then be a merger of course.

The Referee: Well, if the petitioners prevail here, it will have to be on the theory that the purchasers of this contract stood in a fiduciary relationship to the company. Is that correct?

Mr. Grainger: That is the basis of the— [457]

The Referee: That they had no right to purchase it personally without first giving the company the same opportunity of which they availed themselves? Isn't that right?

Mr. Davis: I believe that is the position, yes.

The Referee: In other words, they purchased a claim against the company—they purchased a claim against the company for something substantially less than the amount of that claim. They attempted to put themselves in the position of the claimant. In other words "For \$15,000," they said, "we are now in a position to claim \$137,000 from the company."

Now if the bankrupt is to prevail here, it must be upon the theory that whoever purchased this contract for \$15,000 stood in a fiduciary relationship to the company; that they had no right to consummate that transaction and

acquire that claim without first putting the corporation upon notice, without giving the corporation an opportunity to make the same deal which they were able to make and which they did make.

All right. Now—

Mr. Grainger: One added consideration: Of course, likewise, if some of the parties are fiduciaries and one of the others might not be a fiduciary, if he knows that he is dealing with a fiduciary—

The Referee: Those are refinements of the situation that we will get into later. Now, then, if the Court should go along with the petitioners that far without at this time [458] making any determination of who the purchasers might be—let us see, whoever the purchasers were, if they stood in a fiduciary relationship, then the corporation is liable or was liable to the purchasers for whatever they actually paid; is that correct?

Mr. Grainger: I think that the corporation would have to do equity, and that might be the equity.

The Referee: It certainly—

Mr. Grainger: I think that probably is the situation. There might be a question in this instance, if we should prevail, whether it should be \$15,000 or whether it should be the \$10,000 that it could have been obtained for.

The Referee: Well, certainly the corporation's obligation to the Cruickshank Company has been dissolved, has it not?

Mr. Davis: Yes.

The Referee: The corporation no longer has any obligation to the Cruickshank Company?

Mr. Davis: That is correct, your Honor. It is out of it.

The Referee: That being so, then, if the purchasers stood in a fiduciary relationship and their claim against the company was limited to what they had been out of pocket, then on the same reasoning and on the same basis the corporation has a liability to them for what they put out in order to put the Cruickshank Company out of the picture.

Mr. Davis: I think your observation is right, your Honor; [459] and that of course is the theory we were going on. There is one thought; I would like to present it for what it is worth.

The Referee: Yes.

Mr. Davis: That is that if Mr. John Harrah and Mr. Carleton Kinney and Mr. Eddie Gerety, in exercising their fiduciary obligation, had deemed that it was for the best interests of the corporation to purchase this on behalf of the corporation and had not as a result interfered, the corporation itself would have purchased it for \$10,000. Now that offer was actually presented.

The Referee: I will settle that point for you right now. I don't think you have a leg to stand on, because the trouble with you fellows was you were trying to get it for nothing. Nobody would put up any money. You had this \$10,000 thing dangling, but you were hoping that things would so work themselves around that perhaps nothing would have to be paid on the Cruickshank contract; and you were not going to put out any money unless you absolutely had to. And I am not going to hold these people, if I hold with you at all—that these people are going to have to be penalized for \$5,000. I don't think there is a chance in the world of your getting that. That I think clears up the situation. And that is

the relief that could be granted on this petition; namely, a decree that the present owners of this contract could not collect anything in excess of \$15,000 on the contract. [460]

All right, who wants to argue first?

Mr. Kitzmiller: With regard to the first point your Honor raised, was Gerety in a fiduciary relationship?

The Referee: Yes.

Mr. Kitzmiller: Before even talking about the facts with regard to that, I would like first to quote from the *Corpus Juris*. This seems to be about the best statement I can find of the law with regard to this particular matter. It speaks of a director or officer—and we need not go into the question as to whether Gerety is an officer or anything like that; there is law in California holding that he is not an officer; and there is some law, an industrial accident case, holding that he is an officer of the corporation; and I think it is too much of a refinement to argue one way or the other here. The thing that would determine that would be his duties and his powers and his discretion and so forth and so on. And that is more of a matter of fact than just a blanket statement that he is or is not an officer. Reading from Volume 19, *Corpus Juris Secundum*, Section 800, Page 185:

"A director or officer has a right to purchase the outstanding obligations of the corporation and enforce payment of the same, unless the circumstances surrounding the transaction render it inequitable for him to do so; and where the corporation is a going concern he may purchase at a discount and recover the full value of the claim unless there is a present duty to act for [461] the corporation by purchasing or extinguishing the claim, and the rights of other creditors are not involved. Where,

however, the corporation is insolvent he is precluded from recovering more than he paid for the claim."

Now that is the general statement of the law. In other words, an officer or a director has a right under normal circumstances to acquire a claim against a corporation at a discount and charge the corporation the full amount unless the corporation is insolvent. And there has been no showing here; so I don't think we have to go into the insolvency question. In fact, evidence was prevented from being put in there to show that the corporation was solvent. So we have here a corporation that is solvent, though it might not be ready cash—and I can go into other cases on the matter of this ready cash when we get down to the refinement—but here are the facts we have before we get to the specific case law: Mr. Gerety was manager of the Abbot Kinney Company. I don't care whether you call him general manager or what you call him. Mr. Gerety, as such manager of the corporation, had no power or no duty to negotiate for and on behalf of the corporation or for and on behalf of the Executive Committee or the Board of Directors for this contract. The witnesses that have testified here—and that is the directors, Mr. Harrah, we will say, an adverse witness; Mr. Newton, favorable to the petitioners; Mr. Halper, favorable to the petitioners; [462] and Mr. Halper quoted Mr. Williams. But we have this situation: that from 1937 on down to 1944 the Board of Directors, the Executive Committee, the stockholders, knew of this Cruickshank contract; and some of the members of the Board of Directors wanted to buy the contract, irrespective—we will say for the corporation, forgetting any individual motives—the Newton and Davis group wanted

to buy it for the company and solely for the company. On the other hand we have Harrah and Halper and Williams—Williams being a bondholder and having a portion of the time been a director—and Carleton Kinney not wanting to buy the contract for the corporation. Irrespective of whether the best interests of the corporation would be served by the purchase of that contract, there wasn't any duty on the part of Mr. Gerety to purchase the contract, to negotiate the purchase of the contract. The evidence from the witness produced by the petitioners, Mr. Darling, shows that negotiations had gone on for a year or a year and a half with Mr. Davis and so forth. And what could Mr. Gerety add to the picture and what could Mr. Gerety do in the way of having the corporation purchase that contract?

No evidence at all has come out that he neglected to discuss with any one, except one statement by Mr. Newton, which was contradicted, that he, on June 6th, I believe it was, was asked to help Mr. Newton influence Mr. Harrah to purchase the contract. Mr. Gerety denies that. But suppose [463] he did talk to him about purchasing the contract. What possible relationship was there with Mr. Gerety and with other people negotiating for the contract—and irrespective of whether the other people that were negotiating for the contract were members of the Board of Directors, they were not purchasing the contract—what duty was there on Mr. Gerety that would prevent him from going out and buying the contract? Was there anything that he knew about the contract that was not known to the other officers or the Board of Directors of the company? What fiduciary relationship did he fail to carry out by going and negotiating for the

contract for himself, irrespective of Mr. Brown and so forth and so on?

If he had gone to the Cruickshank people—there is no showing that the company would ever have taken it over. There is no showing he could have done anything—we will say from the first of June to the 13th or even back for a year and a half—that would have aided the company to go ahead and purchase this contract, not a thing that he could have done.

On the other hand—and his motives were, as he said, that he thought that the contract would do him good, they were talking about ousting him—on the other hand, if he hadn't purchased the contract, was there any particular detriment that could have occurred to the corporation? None that I can see. In other words, you cannot go out into a problematic situation that maybe Cruickshank, who had been going along for years and had not collected any money—and [464] after the Davises started to tell him that so much would be paid and then Halper came along and other people came along—you can't say this contract suddenly started to assume some sort of a value to the Cruickshank people. There is no knowing whether or not they would not have gone along after they sent this notice and tried to negotiate some sort of a settlement, maybe on a \$7500 basis as that first payment, maybe on a \$30,000 basis for the second payment; maybe a \$15,000 basis or a \$5,000 basis as a second payment. There is no telling what they would have done.

But there is nothing to show that Mr. Gerety's purchasing the contract did of itself hurt the company or that Mr. Gerety violated any fiduciary relationship he had with the company. He had no fiduciary relationship

with the company. He had no discretionary powers in so far as the corporation was concerned. The best that can be said of him is that he was merely a ministerial officer.

Now with regard to other cases that may be in our favor, very much in point: I would like to read from what I consider the best case on the subject. We have the California case that is fairly good; but the best, I believe, is that of Glenwood Manufacturing Company vs. Syme, et al., 85 Northwestern, 432, Supreme Court of Wisconsin. I will briefly go over a part of the facts. When I give the facts, they will be the pertinent ones and truly stated. Alexander Syme was president and a director of the plaintiff. [465]

"Plaintiff's business was manufacturing and selling wood products at Glenwood, Wisconsin. The value of its property and assets was \$300,000, and its liabilities other than its capital stock were \$227,000. On November 1, 1898, and for a considerable time thereafter, the company was embarrassed for want of ready money, and unable to pay its debts as they matured. . . . On November 1, 1896, plaintiff was indebted to one H. L. Humphrey, as assignee of Alfred J. Goss, on two notes of \$9,000 each, but which had been reduced by payments to the sum of \$11,000. . . . Humphrey offered to sell the notes to plaintiff" (that is, the corporation), "the 427 shares of stock, and the three-eighths interest in the said firm for \$15,000, then worth at the aggregate at least \$45,000. Alexander Syme purchased the same for \$15,000, for himself, without the knowledge or consent of any of the plaintiff's stockholders, knowing that the purchase by plaintiff would be greatly for its interest."

(This is the director and the president of the corporation.) "To conceal the true character of the transaction Syme caused the purchase to be made in the name of W. P. Hewitt, who owned the firm until October 11, 1897, when it was turned over to Syme. . . . In February, 1897, plaintiff was indebted on a note of \$18,000 to the [466] Skowhegan Trust & Savings Bank upon which Syme was the endorser or guarantor. Without the knowledge and consent of any of the stockholders, or without any effort to purchase the same for plaintiff Syme purchased the same for \$9,000 with his own funds. . . . On October 11, 1897, Syme presented the notes he had purchased from the bank and from Humphrey to the plaintiff, and demanded and received a note for the sum. . . . Syme died intestate, holding such claim. . . . The prayer for relief" (I am skipping through this) "is for an accounting regarding the three-eighths interest in the aforesaid firm, and a settlement on the theory that plaintiff was entitled to the benefit thereof; also that plaintiff is entitled to the 427 shares of stock, and the surrender of the notes taken in renewal of the ones purchased from Humphrey and the bank, upon allowance of the sum actually paid out by Syme."

Those are the facts in this case. And here is the law in the case—and, as I say, I think this particular case goes into the law more fully than any other case that I have been able to find:

"The remaining question involves the right of an officer and director of a corporation to purchase outstanding liabilities of the corporation at a discount [467] and enforce them in full. . . . The rule has been broadly stated by some of the authorities that 'A trustee,

executor, or assignee cannot buy up a debt or encumbrance to which the trust estate is liable for less than is actually due thereon, and make a profit to himself.' That is the doctrine sought to be invoked in this case, as applicable to a director regarded as a trustee of the corporation. But the statement, however correct in its application to specific instances, must be taken with the limitations which belong to it. The foundation of the rule is that a fiduciary agent, owing the duty to his principal, cannot make a contract for his own benefit which is inconsistent with that duty. It is where there is a collision between trust duty and personal interest that the equitable prohibition applies. The cases usually cited to support the doctrine are where a trustee buys in the property of his principal at a sacrifice for his benefit, when, if he bought it at all, it was his duty to do it for his principal, or he makes a contract on behalf of his principal with himself, directly or indirectly, as the other party to the agreement, or where by some secret arrangement he makes a profit directly at the expense of his principal. . . . As before stated, the entire basis of the rule consists in the collision between trust duty and [468] personal interest. Can it be said that any such conflict exists in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations? This is the test to be applied to the facts stated in the complaint. . . . There was no present duty upon Syme to extinguish the note so far as it appears from the complaint. It is not charged that he neglected any duty he owed to the corporation in not securing funds for their discharge, or that he diverted any of its moneys properly applicable thereto to other purposes. The plaintiff's case rests upon the proposition

that, being an officer, he could not purchase said notes at a discount. We are not prepared to accept this statement in its entirety. It is only in cases where the conflict of duty arises that the rule is received in its fullest application." It goes on:

"In MOR Private Corporation, Section 521, it is said: 'So an agent of a corporation may purchase claims against the company at a discount, and enforce them in full if he is not under an obligation to make the purchase on behalf of the corporation.' The Supreme Court of Kansas approved the statement as the law in a case where the treasurer of a railroad purchased its promissory notes at a discount and he was allowed to enforce them at their face value. In Inglehart versus Hotel Co., [469] 32 Hun., 337, the law is stated thus: 'So, also, a trustee or director may with his own money purchase for himself, of a third person, a valid and subsisting outstanding debt owing by the company, and securing a perfect title thereto. Such a transaction is not even the ground for entertaining the suspicion that it is in violation of any duty which he owes the corporation, and there is no presumption of law against its fairness. . . . The other question to be considered in this connection is, will the trustee or director be permitted to enforce a collection of the debt thus acquired for its entire amount, or shall he be limited to the sum paid for the debt or obligation. I am unable to discover any good reason why he should not be permitted to enforce payment for the full amount, nor can I find any decision limiting the trustee to the sum actually paid.'"

Then it says,

"But we need not prolong the discussion. As we construe the complaint, it fails to show any breach of duty

on the part of Mr. Syme for which he could be held liable in this action."

As I say, that particular case to me was the best statement of the law.

Coming now to California—

The Referee: We will have to interrupt you now and take an adjournment. [470]

Los Angeles, California. Friday, July 27, 1945. 10:00 O'Clock, A. M., Session.

(Whereupon ensued argument by counsel, at whose request the proceedings were not reported.)

The Referee: This matter is before me as a Special Master. Counsel for the petitioners have prepared the Special Master's report?

Mr. Grainger: This is not as a Master.

The Referee: I have seen only one order, and that is the Special Master. Did you get another order?

Mr. Davis: As we understood it, the Court would bring that over, your Honor. The whole matter has been referred to your Honor as a Referee in Bankruptcy.

Mr. Kitzmiller: That is what we understand.

Mr. Davis: What was that order—

The Referee: We have only one order here, that of the Special Master.

Mr. Grainger: That has to do with the issues as to the involuntary—

The Referee: It does not say so.

Mr. Davis: The point was that Judge O'Connor said that the whole matter would be referred to you, and we asked the specific question, "Will the clerk prepare the order of transfer?" And he said yes. And this—

The Referee: You get it straightened up. If it is [471] referred to me as Referee, then prepare findings, conclusions and order. If it is referred to me as Special Master, prepare the report, -including findings and conclusions and the recommendations.

All right, there is no question at all in my mind, gentlemen. This picture is so clear it does not admit of any doubt whatsoever. A very old and distinguished and venerated member of this Bar, J. Wiseman Macdonald, said, "For every wrong there is a remedy." There is no question but what there is a wrong here.

You have read from some decisions, most of them old decisions; but I think the court is modernizing itself all the time to do more and more equity and more and more justice. And even the cases you rely on contain the phrase "in the absence of fraud or inequitable circumstances." Here we have both. We have the fraud, and we have inequitable circumstances.

I am not going to take up your time unnecessarily in a discussion of the point I raised, because I am entirely satisfied beyond a question of a doubt that there is not only preponderance of the evidence but that the proof has been made beyond a reasonable doubt that here was an unconscionable conspiracy and confederation, headed by John Harrah, to gain an unconscionable advantage for himself over the other people with whom he was connected one way or another in this corporation. All down through the years he has taken the [472] position, and with good, sound reason, that no money should be paid unless it became absolutely necessary on this Cruickshank Company contract because it would be to the disadvantage of the bondholders. He had a right to take that position. Everybody knew what his place was in the set-up, that

he represented the bondholders. The other people, who were capable and competent to take care of themselves, were in the picture to take care of themselves; so it cannot be said that Mr. Harrah was recreant in his duty because he looked out for the bondholders. Yet, in spite of this record, we find that this contract is purchased and that \$7500 is almost forthwith paid on it. Now why? Because, by a strange coincidence, at the same time the Cruickshank Company had sent out a letter threatening to turn off the water. The attorney who prepared that letter, who caused it to be sent, said it was just for the purpose of establishing a technical default. But, as I say, by a coincidence it comes at the same time. So Charles Brown walks into a meeting of the Executive Committee, at which all members of the committee are not present, and says, "I am going to turn off the water unless I get \$7500; and if I get \$7500, I won't turn it off for three months hence."

Now when Mr. Harrah first took his position in this matter, he knew that under the terms of this contract there was a provision that the water could be turned off, that the pipes could be repossessed, the system could be torn out. [473] He knew that all down through the years. It wasn't any news to him.

I venture to say that if Mr. Darling or any representative of the Cruickshank Company or anybody except the one that Mr. Harrah was in league with had walked in with that demand, Mr. Harrah would literally have thrown him out of the office. He wouldn't have gotten a dime. But imagine—although Mr. Harrah knew that there were forces in this corporation that had been urging that this contract be purchased for the corporation for the nominal sum of \$10,000, notwithstanding the fact

the he knew all that, Mr. Harrah, with the assistance of Mr. Kinney, who permitted himself to be used in the matter, immediately wrote out a check for \$7500 and got not one single, solitary thing in writing from Mr. Brown to evidence the fact that they had at least three months grace in the situation. He just handed out \$7500 forthwith. And then, when Mr. Harrah knew that the day of reckoning finally had come, that his power as a member of the Executive Committee was to come to an end on the next day, again by a strange coincidence Mr. Charlie Brown sits down and writes out a demand dated November 6, 1944, which is in evidence here and is Bankrupt's Exhibit 4. Then, although Mr. Harrah knew that on the following day a meeting of the stockholders was to be held, nevertheless Mr. Harrah, again with the gracious assistance of Mr. Kinney, immediately writes out a check for \$30,000, and delivers it [474] the next day, November 8th. And they were in such a hurry to get that check cashed by the bank that the physical evidence here shows that that check was never even folded once, nobody even as much as put it in his pocket or in his purse or in his billfold. It was either delivered right at the banking house of the Security Bank itself or was taken poste-haste by Mr. Brown with it in his hand down to the bank in order to get it in his account or to cash it or to do whatever he did—I think he said he deposited it in his account.

So, if Mr. Harrah was not an interested party in this transaction, do you think that he would have forthwith paid that \$30,000? Certainly there would be every reason favoring his stalling the matter until the following day, until he could have placed the responsibility on the shoulders of the stockholders. No man would have assumed

that responsibility of paying out \$30,000, at least 75 per cent of all of the cash resources of that corporation at that time. And he would not have done it in view of his interest as a bondholder in the corporation.

The conclusion is inescapable that this is an unconscionable deal engineered by John Harrah. I am not convinced at all that Charles Brown has the slightest monetary interest in this transaction, and this notwithstanding the documentary evidence of a bank account in the name of Charles Brown.

We have a situation here which we find once in a while of [475] a man who got into financial difficulties and who sought relief from the bankruptcy court; and up to this moment, although some years have elapsed, he is not receiving that relief—he may still get it, I am not sure; but thus far and he does not know—and we find the traditional picture. He writes a check for \$3,000 and signs his name to it. But it is not his money. It is the money of his son, his close relative, who does business up in Reno, Nevada, on his own. It is elementary here in the bankruptcy court that those circumstances are suspicious circumstances. Here is Charles Brown, a very likeable gentleman, a nice man; but he does not give the impression that he is a man who would gamble \$10,000 of his own money on a contract upon which nothing had been paid for I do not know how long.

Mr. Davis: 1932, your Honor.

The Referee: Since 1932. Mind you, Charles Brown says he gave a cashier's check with his own money, \$10,000. Now we do not know what Charles Brown was worth, and I am not going to attempt to appraise his financial status. He says he bought it because he wanted some kind of a leverage against the corporation in the

matter of the continuation of his leases—he had the Slide lease and he had the Bridgo lease. Did Charles Brown gamble \$10,000 of his money that he could profit to that extent by buying this contract? I do not believe it. I think the thing is a Harrah deal first, last, and all the time. [476]

He took Mr. Gerety in with him. Yes, Mr. Gerety was very close in that. And I think there was good reason for Mr. Harrah's letting Mr. Gerety in on the deal in some manner. But Harrah was the one who engineered the thing, conceived it, carried it into execution, and personally profited by it. I haven't the slightest doubt of that situation. Referring again to this exhibit very briefly, it is interesting to note that in Bankrupt's Exhibit 4, Mr. Brown says, among other things, "I agree to not turn the water off in the system for a period of one year from this date, except that I may turn the water off at any time if the company is adjudged bankrupt or a receiver is appointed for the company or for the property covered by the trust indenture or if any of the present directors are removed or if the Executive Committee is changed or its powers restricted." That is what Mr. Charlie Brown said. Why he found it necessary to put it in there I do not know.

Now this court has full and ample and complete jurisdiction to settle this matter. An involuntary petition in bankruptcy was filed. It was contended that it cannot possibly result in an order of adjudication; that it is insufficient; that it is defective. But no collateral attack may be made on the involuntary proceeding. Whatever the petition says when it is filed, an involuntary petition is filed, the Court immediately acquires full and complete jurisdiction. Now that is not to the disadvantage of any-

body. If the petition [477] is defective, if it is not proper, the Court is always open to entertain a proper motion to dismiss or to require that it be amended or what not. For, as long as the petition remains undismissed, the Court has full and complete jurisdiction over the alleged bankrupt and his assets. Here is a transaction whereby, after the Court had acquired jurisdiction, the Executive Committee of this corporation undertook to pay out \$30,000 of the corporation's money. This Court has jurisdiction to determine the propriety of that disbursal.

The Court finds that it was not proper to the extent of \$22,500. The Court finds that all that Charles Brown may receive, as the nominal holder of this contract, is the total sum of \$15,000, the amount which was paid for it; that he already received \$7500 prior to bankruptcy; and that all that could be paid to him at the time the \$30,000 was paid was the sum of \$7500. That he is entitled to. The balance belongs to the bankrupt corporation. And the clerk will be directed to pay to Mr. Charles Brown the \$7500, the balance to be paid to whoever is the custodian of the assets of the alleged bankrupt—

Mr. Davis: That is the corporation, your Honor.

The Referee: That is the corporation, no receiver having been appointed?

Mr. Davis: That is right.

The Referee: (Continuing) —and that upon the payment of that \$7500 Charles Brown shall have no further claim [478] of any kind whatsoever against the corporation on account of this contract; that Edward A. Gerety shall have no claim against the corporation; that William Harrah shall have no claim against the corporation. William Harrah will have to settle with Charlie Brown. That deal was made after the \$30,000 deal, after

the \$30,000 was paid to Mr. Brown and before Mr. Brown paid it into court.

We are now determining, gentlemen, the propriety of that \$30,000 payment. It has been here in a state of suspension. We could determine that it was proper and order the holding of the \$30,000. We could determine no part of it was proper. We are now determining that to the extent of \$7500 it was proper, but that that extinguished all claims against the corporation. Consequently when some weeks later Mr. William Harrah paid \$3,000 through his father for an interest in the contract, he just acquired nothing. You gentlemen will of course exercise your own views as to the proper phraseology to be employed. I think I make myself clear: The \$7500 completely discharges the obligation of the corporation, and none of the parties to this proceedings can have any claim against the corporation on the contract. [479]

In the District Court of the United States
Southern District of California
Central Division

Before Hon. Benno M. Brink—Referee

State of California
County of Los Angeles—ss.

I, Clifton Clay, official reporter of the above-entitled court, do hereby certify that the foregoing pages 1 to 479, both inclusive (Vol. I and Vol. II), comprises a full, true, and correct transcript of the testimony offered or taken and all rulings, acts, and statements of the Court; also all objections or exceptions of counsel, and all matters to which the same relate, made during the progress of

said proceedings of July 24, July 25, July 26, and July 27, 1945, in re: Alleged Bankrupt versus Charles J. Brown, E. A. Gerety, William Harrah and John Harrah.

Dated this 29th day of August, 1945.

CLIFTON CLAY,
Official Reporter.

[Endorsed]: Filed Aug. 31, 1945. [480]

[Endorsed]: No. 11397. In the United States Circuit Court of Appeals for the Ninth Circuit. E. A. Gerety, William Harrah, Charles Brown and Harold Pool, Appellants, vs. Abbot Kinney Company, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 29, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 11397

United States Circuit Court of Appeals
for the Ninth CircuitWILLIAM HARRAH, E. A. GERETY, CHARLES
BROWN,

Appellants,

v.

ABBOT KINNEY COMPANY, a corporation, Alleged
Bankrupt,

Respondent.

APPELLANTS' STATEMENT OF POINTS ON
WHICH THEY INTEND TO RELY ON THIS
APPEALTo the Honorable Judges of the United States Circuit
Court of Appeals, for the Ninth Circuit:Pursuant to the rules of this Court, William Harrah,
E. A. Gerety, and Charles Brown, do hereby file with this
Court the following concise statement of the points on
which they intend to rely on this appeal.

I.

That the United States District Court had no jurisdiction
to entertain the proceeding appealed from or to enter
the order appealed from for the following reasons:

- a. That no person qualified to file an involuntary petition
in bankruptcy signed or joined in the involuntary
petition.
- b. That the amended involuntary petition does not
state an act of bankruptcy.

c. That the alleged bankrupt, Abbot Kinney Company, had no legal right to institute the proceeding resulting in the order appealed from.

d. Where the parties stipulated in writing as to the procedure to be followed and the stipulation was approved by the Referee in Bankruptcy, it was error to permit a repudiation of the stipulation and proceed contrary thereto.

e. Where the involuntary petition in bankruptcy was dismissed, it was error not to dismiss summary proceedings instituted by the alleged bankrupt before the District Court against your petitioners.

f. The Referee erred in making the following findings of fact and the District Court erred in approving the same in respect to the following material facts:

1. That there was a fiduciary relationship between E. A. Gerety, John Harrah, William Harrah or Charles Brown in respect to Abbot Kinney Company and that the purchase by Charles Brown and E. A. Gerety of the Cruickshank contract was a violation of said fiduciary relationship.

2. That there was a conspiracy between E. A. Gerety, John Harrah, William Harrah and Charles Brown to defraud Abbot Kinney Company of the Cruickshank sprinkling contract.

3. That there was a conspiracy between E. A. Gerety, William Harrah and Charles Brown to have payments made upon said contract.

4. The Court erred in modifying the findings of the Referee and findings that Abbot Kinney Company had the opportunity of acquiring said sprinkling contract for the sum of \$10,000.00.

5. The Court erred in failing to find when said conspiracy arose and the period of time which the same existed.

6. The Court erred in finding that there was discretion in the District Court as a Court of Bankruptcy to entertain the petition and order to show cause which resulted in the order appealed from.

7. The Court erred in finding that the District Court was vested with jurisdiction to entertain a proceeding to determine title to property on the filing of a defective petition.

Dated this 22nd day of July, 1946.

LESLIE L. HEAP

D. M. KITZMILLER,

COBB & UTLEY

By Francis B. Cobb

Attorneys for Appellants

Received copy of the within Appellants' Statement, this 25th day of July, 1946. Grainger & Hunt, Attorneys for Respondent.

[Endorsed]: Filed Jul. 29, 1946. Paul P. O'Brien,
Clerk.

